SHOULD OUR JURY SYSTEM BE MODIFIED?

The Pro and Con Monthly

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History of Trial by Jury
The Jury System in the United States
Modern Movement for Jury Reform

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Pro and Con Feature

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Regular Features

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LEGISLATIVE DEPARTMENT

THE PRO AND CON FEATURE ACTION BY HOUSE AND SENATE LEGISLATIVE NEWS ITEMS

Should Our Jury System be Modified?

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Foreword

WITH the appointment by President Hoover of the National Commission on Law Observance and Enforcement, and the organization of that body, public interest in the general question of law enforcement has materially increased.

Among the problems receiving the special attention of the Commission is the question of increasing the promptness in handling the business of law courts. Among the phases of that particular problem is the question whether the jury system in both criminal and civil cases is responsible for much of the delay in American court procedure which has been the subject of so much adverse criticism both by judges and members of the bar.

In this issue of THE CONGRESSIONAL DIGEST the question of the jury system alone is considered although the text of some of the bills now pending in Congress providing for the modification of the jury system endeavor to reach other phases of the general condition involving crowded court calendars and proposed methods for the improvement of that condition.

Three years ago the Bar Association of the City of New York made an investigation of the causes of congested court calendars in the courts of that city, both state and Federal, with the result that the Association recommended modification of the jury system. This action has given added impetus to the general discussion.

As will be noted in the ensuing pages of this issue of THE DIGEST the question, however, is not a new one. For many years members of the bar have been discussing, pro and con, the relative advantages to the individual and the state of the powers of judges or jurors.

The History of Trial by Jury

How the System Grew Out of Ancient Society

By William Forsyth, M. A.

Fellow, Trinity College, Cambridge

TRIAL by Jury does not owe its existence to any positive law:—it is not the creature of an Act of Parliament establishing the form and defining the functions of the new tribunal. It arose, as I hope to show, silently and gradually, out of the usages of a state of society which has forever passed away, but of which it is necessary to have a clear idea, in order to understand how this mode of trial first came into existence.

A Baffling Study

Few subjects have exercised the ingenuity and baffled the research of the historian more than the origin of the jury. No long time has elapsed since the popular opinion was—and perhaps it even now prevails—that it was an institution established by Alfred the Great; and we prided ourselves on the idea that this was one of the legacies of freedom bequeathed to us by our Anglo-Saxon ancestors. An enlightened spirit of historical criticism applied to the subject has, however, of late years, done much to dissipate this delusion; and it would be unjust not to acknowledge how greatly in this country we are indebted for more correct views to the labors of Reeves, Palgrave, Starkie, and Hallam. But the jurists of Germany also deserve the praise of having investigated the question with profound learning and searching accuracy, and the frequent reference made in the course of this treatise to their works will prove how fully I appreciate the services they have rendered in the elucidation of the present inquiry.

Views of Leading Authorities

Numerous have been the theories as to the birth and parentage of this the favorite child of the English law. Some writers have thought the origin so lost in the darkness of antiquity, as to render investigation hopeless. Thus Bourguignon says, "Its origin is lost in the night of time;" and the late Chief Commissioner Adam declares that "in England it is of a tradition so high that nothing is known of its origin; and of a perfection so absolute that it has remained in unabated rigor from its commencement to the present time." Spelman was uncertain whether to attribute the origin of the system to the Saxons or the Normans. Due Cange and Hickes ascribed its introduction to the Normans, who themselves borrowed the idea from the Goths. Blackstone calls it "a trial that hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof;" and he adds, "that certain it is that juries were in use among the earliest Saxon colonies."

Feudal Courts of the Crusaders

In his learned work on "The Origin and Progress of the Judicial Institutions of Europe," Meyer regards the jury as partly a modification of the Grand Assize established by Henry II, and partly an imitation of the fuedal courts erected in Palestine by the Crusaders; and he fixes upon the reign of Henry III. as the aera of its introduction into England. The theory of Reeves in his "History of the English Law," is that when Rollo led his followers into Normandy they carried with them this mode of trial from the North. He says that it was used in Normandy in all cases of small importance, and that when the Normans had transplanted themselves into England they endeavored to substitute it in the place of the Saxon tribunals. He speaks of it therefore as a novelty introduced by them soon after the Conquest, and says that it may be laid down with safety that the system did not exist in Anglo-Saxon times. Turner, on the other hand, in his "History of the Anglo-Saxons," thinks that it was then in use, "although no record marks the date of its commencement;" and he ought to have added, or "notices the fact of its existence."

Sir Francis Palgrave says that a tribunal of sworn witnesses elected out of the popular courts and employed for the decision of rights of property, may be traced to the Anglo-Saxon period: but that in criminal cases the jury appears to have been unknown until enacted by the Conqueror.

Scandinavians and Normans

The opinion of one of the latest and ablest of our legal writers, Mr. Sergeant Stephen, seems to coincide with that of Reeves, for he says, "The most probable theory seems to be that we owe the germ of this (as of so many of our institutions) to the Normans, and that it was derived by them from Scandinavian tribunals, where the judicial number of twelve was always held in great veneration." He refers also to the Grand Coustumier as justifying the idea that the jury is of Norman origin. But we remark in passing, that this work was written later than the year 1215; so that, whatever may be the similarity of usage between the two countries which we find therein mentioned, it is more probable that the Norman was derived from the English.

Ancient Teutonic Tribunals

Some writers, especially amongst the Germans, attribute the origin of the English Jury to a national recognition of the principle that no man ought to be condemned except by the voice of his fellow-citizens. And as the ancient courts of justice amongst the Teutonic nations were nothing more than assemblies of freemen, met together for the purpose of deliberating on whatever affected the interests of the gau or district of which they were inhabitants, including the punishment of offenses and the settlement of civil claims, it has been thought that here is to be found the assertion of the same principle as pervades the jury-trial, and that therefore the latter is derived from

and only a modification of the former.

The Natural Growth of the Jury System

But if this be so, how can we account for the fact that in England alone the system was developed into its modern form, and that while amidst all the freedon of Anglo-Saxon institutions it was unknown, it first assumed a distinct and historical character under the reign of a Norman king? We shall see, unless I am mistaken, in the course of our inquiry, that the jury does not owe its existence to any preconceived theory of jurisprudence, but that it gradually grew out of forms previously in use, and was composed of elements long familiar to the people of this country. Where such diversity of opinion prevails, and so many learned men have professed their inability to pierce the darkness that surrounds the early history of the subject, it well becomes a writer to be diffident of his own view; but I can not help feeling persuaded that the rise of the jury system may be traced as a gradual and natural sequence from the modes of trial in use amongst the Anglo-Saxons and Anglo-Normans,—that is, both before and after the Conquest,—and that therefore in order to understand how it arose, we have only to make ourselves fully acquainted with those modes of trial and the state of society on which they so intimately depended.

Causes of Mistaken Views on Origin of Jury

In endeavoring to trace the origin of any institution which has come down to us from remote antiquity, we must carefully consider under what aspect it appears when first noticed by contemporary writers. This often differs widely from the form and character which it acquires in the slow growth of years, and yet its identity may be proved with as much certainty as that of the river whose well-head is a spring oozing out of a grassy bed, and which swells into a broad expanse of waters before it loses itself in the ocean. We shall only be deceived if we fix our attention upon its maturity rather than its infancy; upon its end rather than its beginning. In constitutional history this is eminently true. We must deal with institutions as philology does with words. To ascertain the derivation of the latter we resolve them into their earliest known forms, and these are often the only clue whereby we can discover the stock from which they sprung, and the meaning they primarily bore.

Primitive Forms and Characteristics

So in the case of Trial by Jury:—we must determine the point of time when it is first mentioned as an historical fact, and see what were then its characteristic features. We must know its primitive form, and observe in what point of view it was looked upon by the writers of the early ages. The subsequent changes it has undergone will not throw much light upon its origin—nay, they rather tend to mislead us by suggesting false analogies and wrong points of comparison; and many a specious but mistaken theory on the subject would have been avoided, if due attention had been paid to the accounts of the true nature of the tribunal which we find in the Pages of Glanvill and Bracton, and of which we find incidental notice in contemporary annals and records.

Analogies Unreliable

Again, we must be careful not to attach too much importance to seeming analogies, or mistake partial resemblances for complete identity. It is this which has led so n any writers to espouse conflicting views respecting the origin of the jury. By fixing their attention on particular points of two systems, and finding that these in a great measure correspond, they have imagined that the one must have been copied from the other. Thus some think that they discover the archetype of the jury in the Teutonic and Saxon Compurgators, who were generally twelve in number, and whose oaths were conclusive of the matter in dispute. Others derive it from the Rachinburgen or Scabini of the continental nations; others from the sectators and pares of the ancient county and feudal courts in this country.

Athens and Rome

One important feature of the institution is by no means peculiar to it. I mean the fact that it is a sworn tribunal—that its members decide under the solemn sanction of an oath. This was the case with the Dicasts at Athens and the Judices at Rome, and the same principle prevailed in the old Norse THING and German MALLUM, when the right of all the inhabitants of the gau or mark to be present at the judicial proceedings of these periodical assemblies, became in practice limited to a few, as the representatives of the community.

The Distinguishing Features

But sufficient attention has not been paid to what is the distinctive characteristic of the system; namely, that the Jury consists of a body of men taken from the community at large, summoned to find the truth of disputed facts, who are quite distinct from the judges or court. Their office is to decide upon the effect of evidence, and thus inform the court truly upon the question at issue, in order that the latter may be enabled to pronounce a right judgment. But they are not the court itself, nor do they form part of it; and they have nothing to do with the sentence which follows the delivery of their verdict. Moreover, they are not members of any class or corporation, on whom, as distinct from the rest of their fellow-citizens, is imposed the task of taking part in judicial inquiries. They are called upon to serve as the particular occasion arises, and then return to their usual avocations and pursuits, so as to be absolutely free from any professional bias or prejudice.

Separate From the Court

Few writers, when speculating on the rise of the jury, have kept this principle of its being separate from the court and employed solely to determine questions of fact, steadily in view. They have generally confounded the jurors with the court, and have thus imagined an identity between the former and those ancient tribunals of Europe where a select number of persons—often twelve—were taken from the community and appointed to try causes, but who did so in the capacity of judges, and when satisfied of the evidence awarded and pronounced the doom.

These are the Geschwornen-Gerichte to which the jurists of Germany of late years have been so fond of appealing, as the model upon which they wish to reform their modern courts of judicature, and which they assume to have been in principle the same as the English Jury.

A Radical Distinction

But a little reflection will convince us that this is not

so, and that the distinction above insisted on, is not a mere formal one, but of a radical and important kind. It involves, in fact, the question of the possibility of the tribunal continuing to exist. A court of justice where the whole judicial authority is vested in persons taken from time to time from amongst the people at large, with no other qualification required than that of good character, can only be tolerated in a state of society of the most simple kind.

Complication of Civilization

As the affairs of civil life become more complicated, and laws more intricate and multiplied, it is plainly impossible that such persons, by whatever name they are called, whether judges or jurors, can be competent to deal with legal questions. The law becomes a science which requires laborious study to comprehend it; and without a body of men trained to the task, and capable of applying it, the rights of all would be set afloat—tossed on a wide sea of arbitrary, fluctuating, and contradictory decisions. Hence in all such popular courts as we are describing, it has been found necessary to appoint jurisconsults to assist with their advice, in matters of law, the uninstructed judges. These at first acted only as assessors, but gradually attracted to themselves and monopolized the whole judicial functions of the court.

Questions of Law and Fact

There being no machinery for keeping separate questions of law from questions of fact, the lay members felt themselves more and more inadequate to adjudge the causes that came before them. They were obliged perpetually to refer to the legal functionary who presided, and the more his authority was enhanced, the more the power of the other members of the court was weakened, and their importance lessened, until it was seen that their attendance might without sensible inconvenience be dispensed with altogether. And of course this change was favored by the crown, as it thereby gained the important object of being able, by means of creatures of its own, to dispose of the lives and liberties of its subjects under the guise of legal forms. Hence arose in Europe, upon the ruins of the old popular tribunals, the system of single judges appointed by the king, and deciding all matters of fact and law, and it brought with it its train of secret process and inquisitorial examinations. But the result was inevitable. The ancient courts of Scandinavia and Germany carried in their very constitution the element of their own destruction, and this consisted in the fact that the whole judicial power was in the hands of persons who had no special qualifications for their office.

Jury System in England

Far otherwise has been the case in England. Here the jury never usurped the functions of the judge. They were originally called in to aid the court with information upon questions of fact, in order that the law might be properly applied; and this has continued to be their province to the present day. The utility of such an office is felt in the most refined as well as in the simplest state of jurisprudence. Twelve men of average understanding are at least as competent now as they were in the days of Henry II, to determine whether there is sufficient evidence to satisfy them that a murder has been committed, and that the party charged with the crime is guilty. The increased technicality of the law does not affect their fitness to decide on the effect of proofs. Hence it is that the English jury flourishes still in all its pristine vigor, while what are improperly called the old juries of the continent have either sunk into decay or been totally abolished.

Roman Criminal Proceedings

A near approximation indeed to the proper functions of the jury is to be found in the proceedings of criminal state trials amongst the ancient Romans, although we may be quite certain that the English institution is in no way copied from them. There we find a presiding judge, who was either the praetor or a judex quaestionis specially appointed by him, and a body of judices taken from a particular class, at one time the equestrian, and at another the senatorial, whose duty it was to determine the fact of the guilt or innocence of the accused. At the close of the evidence they were said to be missi in consilium by the judge, that is, told "to consider their verdict," and to each were given three tablets marked respectively with the letters A for Absolvo, C for Condemno, and N L for Non Liquet, one of which he threw into an urn, and the result of the trial was determined by the majority of the letters that appeared. If the facta C prevailed, the praetor pronounced the sentence, with which the judices did not interfere. So far the course of procedure seems closely analogous to our own.

Conclusions

But the important difference is this. The Roman judices might, without any breach of legal duty, acquit in spite of the most conclusive evidence of guilt; for they were entitled as representing the sovereign people to exercise the prerogative of mercy, and their verdict in that case implied and was equivalent to a pardon. Their functions therefore were not, like those of the jury, ent of later times, restricted to the mere finding of facts, but extended to the exercise of a power which, with us, is lodged in the supreme executive of the state. We may further add, that when the praetor announced the verdict of the majority, if it was condemno he used the words Videtur Fecisse or Non Jure Videtur Fecisse; if it was absolve, the words Non Videtur Fecisse, or Jure Videtur Fecisse; and perhaps the last form was adopted not only when the facts had been proved against the accused, and there was a legal excuse for the deed, but also when the praetor saw that the acquittal was intended as an act of mercy and a pardon.

I believe it to be capable almost of demonstration, that the English jury is of indigenous growth, and was not copied or borrowed from any of the tribunals that existed on the Continent. Tribunals in ancient times really were, and show wherein the difference between them and our own system consisted; a difference, in my opinion, of so essential a kind, that writers never could have been so misled as to confound them, if they had not occupied themselves rather with what the jury now is, namely, the sole judge of the effect of evidence produced, and the arbiter of compensation for contracts broken and injuries received—with what it originally was, when its verdict was nothing more than the conjoint testimony of a fixed number of persons deposing to facts within their own knowledge.

Let us therefore now turn our attention to the primaeval courts of justice on the continent, and consider first those of Scandinavia, where the system in many points bore such resemblance to our own, as to have induced some authors to maintain the latter must have been derived from it.—*Extracts, see 1, p. 288.*

The American Colonies and the Jury

Application of the System by the Early Settlers

By Felix Frankfurter and Thomas G. Corcoran
of the Harvard Law School

THE colonial charters guaranteed settlers the liberties and immunities of Englishmen and defined legislative power by the laws of England. The newcomers brought with them the legal traditions of James I, of which summary jurisdiction by justices of the peace was a familiar part. Then followed the task of adapting English law to American soil; the old material had to be transformed, not merely transplanted. This was true of the colonial law concerning the powers of magistrates. The colonies did not blindly reproduce English procedure. Primitive settlements across the sea furnished no provocations for conferring magisterial powers upon a justice of the peace similar to the complexities of the elaborate criminal statutes and the centralizing tendencies of the Stuarts. The need for criminal legislation in the colonies was comparatively narrow; and their sparsely settled, homogeneous societies were peculiarly adapted for dealing with wrongdoers through popular forms of justice. Inevitably, therefore, the colonies entrusted fewer matters to justices than did the contemporary English law. Inevitably, also, the English magistrates exercised wider powers of punishment than the colonies gave to their magistrates. Colonial law reflected a low economic level. Land-poor settlers could not pay large fines; man-poor communities were not likely to keep producers under long jail sentences.

Laws of Different Colonies Not Uniform

Nor did the colonies work out uniform rules among themselves. The law of magisterial power in New York, in 1776, was no more exactly like that of Massachusetts, or of South Carolina, than it was exactly like that of England. Different environments evolved different applications of trial by jury and its limits. The isolation of the scattered communities, differences in the composition of their settlers, the paucity of trained lawyers, fostered in each colony distinctive features of a common system.

Despite these differences, all the colonies, to some extent at least, re-lived the experience of the mother country, and resorted to summary jurisdiction for minor offenses with full loyalty to their conception of the Englishman's right to trial by jury.

Laws of Seven Colonies Studied

Seven of the colonies—Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland and Virginia—have been taken as representative of the rest, to ascertain from their printed records decisive evidence as to the use by the colonies of summary procedure. The meaning of the material thus revealed is subject to all the difficulties and doubts which surround old texts when deprived of the commentary of life. Living institutions, with assumptions and significances lacking formal language, must be recreated from the obscuring ambiguity of early statutory language, frequently without the aid of auxiliary evidence of legal practice. Particularly thorny is the attempt to separate formal criminal prosecutions from *qui tam* or civil procedure against offenders. Colonial legislatures, like Parliament, made no sharp distinction between different forms directed to the same end.

After these and like allowances are made in interpreting the colonial material, two results are overwhelmingly established: first, that all the colonies whose records have been examined, acted on the conviction that the much-cherished jury procedure was not imperative for small offenses; secondly, that the practice of summary procedure, pursued in varying measure by the different colonies, persisted unchallenged through the acrimonious controversy with the Crown over the denial of the jury in admiralty courts, through the framing of the jury clauses in state institutions, and through the enactment of the jury clauses in the Federal Constitution.

Massachusetts

The "Puritan's characteristic jealousy of the magistrate" and the strong impulse to a popular form of justice, which came from the close-knit kinship of New England religious congregations, led these colonies to a more restricted use of the familiar summary powers by magistrates than the records of other colonies disclose. The history of Massachusetts Bay is typical of the thought and practice of the New England settlements, which it so largely dominated. But even in Massachusetts vigorous summary procedure was early applied. In 1630 the Court of Assistants appointed the governor and others "justices of ye peace . . . in all things to haue like power that justices of peace hath in England for reformation of abuses and punishing of offenders; and that any justice of the peace may imprison an offender, but not inflict any corporall punishment without the presence and consent of some one of the Assistants." Not until 1634 does the popular General Court specifically resolve that "noe tryall shall passe vpon any, for life or banishment, but by a jury soe summoned, or by the Generall Courte." A general guaranty of trial by jury for crimes awaits the Body of Liberties in 1641. Yet in 1646, following the English model, a single magistrate was empowered to find anyone who "shall sweare rashly & vainely," ten shillings, and upon default put him in the stocks "not exceeding 3 hours & not lesse yn one houre." In 1647 a general statute apparently empowered magistrates to hear without jury all offenses for which the maximum punishment was forty shillings or ten stripes in default, but reserved a right of appeal from conviction to a jury in a higher court. Subsequently special acts extended the jurisdiction of the magistrate to offenses carrying penal-

ties as high as twenty pounds and six months imprisonment, but the principle of a theoretical right to a jury trial on appeal was maintained throughout the period.

Minor Offenses in Massachusetts

This was the procedural system for the enforcement of the heavy volume of Puritan legislation. Some hundred and seventy minor offenses in colonial Massachusetts, a veritable network of social control in the daily lives of the people, were punished in the first instance by the unaided magistrate. The common scold tied to her ducking stool and "dipt over head and ears three times" was sentenced by him as well as the shielder of deserters, the "fence" for stolen continental arms, and the food hoarder during the rationing days of the Revolution. Massachusetts usage thus recognized the right to trial by jury, theoretically at least, in regard to petty offenses for which the law of England did not afford the protection of a jury.

Connecticut

The legal history of Connecticut, for our immediate purpose, follows that of Massachusetts. During its early period a magistrate without jury, it appears, had considerable latitude to punish all sorts of offenses. In 1663, the General Court approved of what "Magestrates haue done formerly, vpon a fame or report of misdemeanor" and for the future authorized that "in case the delinquency appear sufficiently proued, they may pass to sentence, according to Law."

The Connecticut Act of 1706

In 1706, however, Connecticut adopted the policy of the Massachusetts statute of 1647, by giving an appeal to a jury in the county court to anyone convicted before a justice of the peace "for the breach of any penall lawe or a misdemeanor." This act dominates the subsequent administration of the criminal law in Connecticut. Like its Massachusetts prototype, however, it had significant limitations in practice. In 1709 appeal was denied for cases of drunkenness, profanity and sabbath-breaking, and a little later a defendant might appeal from a conviction for selling liquor to Indians only at the risk of paying double his first fine if the appeal went against him.

Justices of the Peace

A conspectus of the Connecticut situation immediately preceding the Constitution is afforded by the revision of the Connecticut laws in 1784. All offenses carrying a penalty of not more than forty shillings were tried by a justice of the peace with a right of appeal to the county court, "on giving security." Some sixty offenses, covering the whole range of colonial life, were included in the authority which the magistrates alone exercised in the first instance. The parent who failed to give his child proper instruction, the shipbuilder who resisted the authority of the state surveyor, the vendor of liquor to Indians, the Ubiquitous peddler and hawker, the petty thief were alike punished before a justice. In addition, some special statutes empowered the justices to inflict heavier fines than forty shillings or corporal punishment. The master of a ship casting ballast into the harbor paid five pounds on conviction before two justices; the killer of deer out of season was fined four pounds, and in default was bound out to service for four months; the returning vagrant received ten stripes. Unfortunately, the available records do not reveal the extent to which the requirement of "giving of security" practically took away what the right of appeal theoretically afforded.

But the final disposition by magistrates without juries of prosecution for drunkenness, sabbath-breaking and swearing, with fines ranging from three to forty shillings, was left by the 1784 revision to the justice of the peace, as were also *qui tam* prosecutions for building fences that encroached upon the highway and for overcharging on ferries.

New York

Contrasted with the Puritan colonies, New York relied heavily for its law enforcement upon the summary powers of magistrates. This practice was part of the effort of the royal administrations to apply English institutions to a population whose heterogeneity, unlike the compact communities of New England, did not make for an indigenous law. Thus, very early in its history the New York legislature followed English models for summary administration of the criminal law. In 1685 justices of the peace were given jurisdiction over the favorite vices of the time, "the Loathsome and Odious sinne of Drunkennesse, profane cursing and sabbath-breaking." The penalty for drunkenness was comparatively heavy, a fine of five pounds or six hours in the stocks. During the early 1700's a variety of statutes provided for *qui tam* prosecutions before magistrates for infraction of laws relating to fish and game, liquor sales to Indians, servants, forest fires, the protection of cattle and the leather trade. The social problems of the eighteenth century covered by the term "vagrancy" led to a ready use of summary jurisdiction showing some characteristics analogous to present-day deportation of aliens. But the elaborate vagrancy act of 1721 has indubitable penal features, under which anyone adjudged by two magistrates to be an idle, disorderly or vagrant person might be transported whence he came, and on reappearance be whipped from constable to constable with thirty-one lashes by each.

Minor Offenses in New York

A series of significant general statutes begins in 1732. To avoid the congestion in the jails of some counties, the cost of holding over offenders till the next General Sessions, and frequent escapes from justice, it was enacted that any person committing "any misdemeanour, breach of the Peace or other criminal offense, under the degree of Grand Larceny" in these counties and not able to furnish bail within forty-eight hours of apprehension, was to be summarily tried by three justices, with power to inflict "such corporal punishment (not extending to Life or Limb) as they in their discretion shall think proper." For New York City the same power was given the mayor, deputy-mayor or recorder. By 1744 this jurisdiction had been extended to the entire colony, the punishment having been mitigated by affording the accused the option of avoiding corporal punishment by paying a maximum fine of three pounds.

The break with England left unchanged the magistrate's share in the administration of criminal justice of the new State of New York. Change of sovereignty affected not at all settled legal traditions. The Constitu-

tion did not give new scope to jury trial in criminal cases; it reaffirmed the established practice. "Trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever."

New Jersey

Summary trial without jury was a familiar mode of procedure in colonial New Jersey, and the practice was undisturbed by the coming of independence. The representative compilations of New Jersey laws during the eighteenth century amply tell the tale. Leaming and Spicer record profanity, drunkenness and sabbath statutes for East and West Jersey, in the 1680's with penalties up to ten shillings and the stocks in default. *Qui tam* prosecutions were employed to punish firing woods, selling liquor, selling to Indians, fornication, carrying concealed weapons, stealing boats, with maximum penalties of five pounds and imprisonment in default. Allinson shows that on the very eve of the Revolution legislation directed against immorality, vagrancy and disorderly conduct was enforced by the state through summary process. Penalties for drunkenness, sabbath-breaking and profanity apparently remained on the statute books uninterruptedly after 1704.

Powers of the New Jersey Magistrates

Vagrancy acts of 1748, 1754 and 1774, gave a single magistrate power to convict and to commit to prison and hard labor for one month, to punish escape from such commitment with six additional months of hard labor and thirty-nine lashes, to order removal to place of origin and inflict twenty lashes for return.

The New Jersey Constitution of 1776 provided that "the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever." But here, as in New York, the Constitution reaffirmed; it did not create. Paterson's compilation of the Jersey laws of 1800 shows that the summary practice continued unchanged after the separation.

Pennsylvania

Pennsylvania, like New York, relied extensively upon summary jurisdiction by magistrates as the normal, effective machinery for dealing with petty offenders. The attitude of this colony is well reflected in a general law of 1700, defining the jurisdiction of the justices:

"Whereas many times, persons for misdemeanors, the fines of which is but small, being presented by the grand jury . . . have been put to great charges by reason of the fees that have accrued thereupon; for prevention whereof,

"Be it enacted . . . That where the fine doth not exceed twenty shillings, one or more justices of the peace, upon due proof of the offense, or being committed in his or their presence, may determine and give judgment in every such case, and issue warrants . . . to levy the said fine upon the offender's goods . . . or may commit the offender to prison, as the law shall direct or require, except in such cases where the law leaves the fine to the discretion of the county court."

"Clamorous Scolding"

Special statutes vesting penal administration in the hands of magistrates began to appear in 1682. Original sin in this Quaker community was "clamorous scolding"; and the first "Great Laws" of the colony empowered a justice of the peace to commit to the workhouse for three days anyone "being clamorous, scolding or railing." The usual blasphemy and drunkenness statutes followed in 1683. Down to the Revolution some thirty instances appear of formal criminal prosecutions pursued without the jury. Scolding, drunkenness, swearing, illicit sale of liquor, fraudulent weighing, failure to observe the standards fixed for beef, flour and leather, infractions of fish and game regulations, malicious mischief to property, vagabondage, roguery, vagrancy and disorderly conduct, sabbath breaches and petty larceny, illustrates the range of misconduct which came before the magistrates. The penalties were from five shillings to ten pounds, with imprisonment from one to three months, and corporal punishment from two hours in the pillory to twenty stripes.

Debt Litigations

Certainly, a fundamental difference as to the place of the jury in these different types of law enforcement is not apparent. Yet, after 1735, by reason of a general statute for all small debt litigations, these debt recoveries were subject to an appeal to trial by jury in the county courts where the amount was over forty shillings.

The post-revolutionary history of Pennsylvania legislation and practice is particularly significant because the guaranty of jury trial in the Pennsylvania Declaration of Rights of 1776 is strikingly paralleled by the language of the Sixth Amendment.

Maryland

"Admiration and adherence from the first," is Reinsch's characterization of Maryland's attitude towards English law. Controversies with the baronial proprietor doubtless stimulated this devotion; but the result is a marked reflection of English legal institutions. An act of the second Colonial Assembly, "For the Authority of Justices of the Peace," adopted wholesale the English practice of summary powers for magistrates:

". . . the offences following in this Act may be heard and determined . . . by any one having Commission for the peace under the great Seal of this Province and the offender may be convicted by the view or hearing of the Judge or confession of the Offender or Evidence of the fact or by the testimony of one wittness . . . every of the said Judges aforenamed shall have power by vertue of this Act . . . to commit any offender to prison till he submit himself to good order or find Security for his good abearance and to take and demand recognisances to that purpose and to keep a Record of all fines and Sentences . . . and to doe use and exercise all or any other the same or the like powers and jurisdictions within this province and the limits of his Commission (in crimes and offences against the laws of this Province) as any Justice of Peace in England useth or of right may or ought to use by Vertue of his Commission for the peace."

Twelve Specific Offenses

A list of twelve specific offenses followed: threatening

to harm the person or goods of another, residing among Indians, swearing, drunkenness, fornication, adultery, improper care of servants, disobedience by servants, profanation of holy days, flesh-eating in Lent, fishing with an unlawful net, raising of false alarm.

New drunkenness and swearing statutes appear in 1642, and from then on, through the Revolution and to the time of the Philadelphia Convention, there is an unbroken development of summary jurisdiction. Between 1642 and 1776 at least eighty-five offenses were subjected to magisterial enforcement.

Virginia

In this colony we again find voluminous evidence of the dispensation of the jury in trials from minor offenses. The judicial system of the first thirty-five years provided no jury for one accused of an offense not involving life or limb as punishment, and it is doubtful whether as late as the middle 1700's a petit jury could be claimed as a matter of right for the trial of anything less than a very serious crime. Furthermore, an ever-increasing amount of minor criminal business devolved upon justices of the peace, who, from the very beginning, were an important part of the judicial organization and who certainly tried offenses without jury. The language of various measure providing for trials by justices of the peace is too ambiguous in many cases to permit a sharp classification between prosecutions exclusively criminal in form and other penal actions. In Virginia, as in the other colonies, early legislation did not draw fine formal distinctions. In some statutes the language plainly looks to technical prosecutions. Thus, profanity and sabbath-breaking prohibitions incurred penalties of five shillings or fifty pounds of tobacco for each offense, with ten stripes in default; disobedient or mutinous sailors "on complaint and proof" before justices suffered "such corporal punishment" as the magistrate saw fit to impose; vagrants might be deported with a whipping from constable to constable, and imprisoned by the justice at their destination, until bond was given for good behavior; papists not "discovering" their horses and arms, or anyone harboring or not revealing such, might be committed for three months by two justices, in addition to forfeiting the treble value of such property. A large number of other offenses were interdicted, in which the self-interest of the individual was relied upon to set in motion the machinery of enforcement. In some instances the informer shared the penalty with the colony, while in others the entire penalty went to the complainant.

Powers of Justices of the Peace

At the time of the Revolution at least sixty-five offenses were thus entrusted to the summary power of magistrates without jury and without right of appeal. Laws concerning liquor selling, highways, waterways, and ferries, currency, Indians, peddling, the important tobacco, flour and beef trades (which were minutely regulated), seamen, hunting, five pounds each was exacted from mutinous seamen, sellers of corn at extortionate prices, unlicensed peddlers, shipmasters carrying tobacco in bulk, those taking tobacco from a warehouse, or packing it in undersized barrels, and twenty pounds was the penalty for harboring a deserter. Many penalties were expressed in terms of goods, the value of which can only be roughly guessed. It is significant that a large volume of this summary jurisdiction developed in the quarter century immediately preceding the Revolution, when the influence of English law was increasing its hold.

The Revolution brought no change in this practice, despite the jury clause of the Virginia Bill of Rights. This is particularly to be borne in mind inasmuch as the Virginia guaranty of trial by jury, together with those of Maryland and Pennsylvania, gives us the clue to the Sixth Amendment.—*Extracts, see 2, p. 288.*

Provisions of the Constitutions Affecting Judges and Juries

Art. I, Section 8, *Clause* 9—The Congress shall have Power to constitute Tribunals inferior to the supreme Court.

Art. II, Section 2, *Clause* 2—The President shall have Power, by and with the Advice and Consent of the Senate, to make Treaties provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointments of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. III, Section 1—The judicial Power of the United States, shall be vested in one Supreme Court, and in such Inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

Art. III, Section 1, *Clause* 1—The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—To all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

State Constitutions and Statutes, Providing for Waiver of Jury Trial

States in Which Constitutional Authority Exists

The constitutions of the following states expressly provide for waiver of jury trial

1. In all cases:

Arkansas—Const. 1874, Art. II, sec. 7, "in all cases in the manner prescribed by law." Sec. 3086 of the Dig. of Stat., 1921, provides that the parties may by consent waive a jury in all cases of misdemeanors.

California—Const., 1879, Art. I, sec. 7, Amendment of Nov. 6, 1928. Previous to this it was allowed "in all criminal cases not amounting to felony by the consent of both parties, expressed in open court." The present statute—Pen. Code, 1925, sec. 1042—allows waiver only in misdemeanor cases.

Maryland—Const. 1867, Art. IV, sec. 8. "The parties to any cause may submit the same to the court for determination without the aid of a jury." In the Code, 1924, Art. 75, sec. 109, it is provided: "The parties to any cause may submit the same to the court for determination without the aid of a jury."

Minnesota—Const. 1857, Art. I, sec. 4, "in all cases in the manner prescribed by law." No statute was found authorizing waiver of jury trial. Sec. 10705 provides: "Every issue of fact shall be tried by a jury of the county in which the indictment was found, unless the action shall have been removed . . ."

North Carolina—Const. 1876, Art. IV, sec. 13: "In all issues of fact joined in any court, the parties may waive the right to have the same determined by a jury, in which case the finding of the Judge upon the facts shall have the force and effect of a verdict by a jury." Yet in Art. I, sec. 13, the legislature is expressly given the power to "provide other means [than trial by jury] of trial for petit misdemeanors, with the right of appeal."

Oklahoma—Const. 1907, Art. VII, sec. 20, like North Carolina, Art. IV, sec. 13.

Wisconsin—Const. 1848, Art. I, sec. 5, "in all cases, in the manner prescribed by law." In the Session Laws, 1925, ch. 124, p. 186, provision is made for waiver of jury in all cases. Previous to this waiver of jury trial was allowed only in misdemeanor cases. Stat. 1911, sec. 4687.

II. In cases below the grade of felony:

Idaho—Const. 1890, Art. I, sec. 7, "by the consent of both parties, expressed in open court." Sec. 8904 provides: "Issues of fact must be tried by jury, unless a trial by jury be waived, in criminal cases not amounting to felony, by the consent of both parties expressed in open court and entered in the minutes."

Montana—Const. 1876, Art. III, sec. 23, "upon default of appearance or by consent of the parties expressed in such manner as the law may prescribe." Sec. 11929 is like Idaho, sec. 8904, *supra*.

Vermont—Sess. Laws, 1921, p. 339, provides for a constitutional amendment allowing waiver by accused with consent of the prosecuting attorney. Passed by the voters in 1923. In sec. 30 of the Const., 1793 and 1913, it is provided: "Trials of issues, proper for the cognizance of a Jury, in the Supreme and County Courts, shall be by Jury, except where parties otherwise agree." This has apparently never been considered as permitting waiver of jury trial in criminal cases.

Virginia—Const. 1902, Art. I, sec. 8. Sec. 4927 of the Code of 1924 allows waiver in misdemeanor cases with the consent of the attorney for the commonwealth.

States Expressly Providing for Waiver by Statute

The statutes of the following states expressly provide for waiver of jury trial

I. In all cases:

Connecticut—Pub. Acts, 1927, ch. 107 (amendment to sec. 6641 of Gen. Stat., 1918). Previous to this it had been held, in State v. Maine, 27 Conn., 281, that waiver was not permitted in the absence of a statute authorizing it.

Indiana—Burns Stat., 1926, sec. 2299.

Maryland—Code, 1924, Art. 75, sec. 109: "The parties to any cause may submit the same to the court for determination without the aid of a jury."

Michigan—Pub. Acts, 1927, No. 175, ch. III, sec. 3 and ch. VIII, sec. 8.

Wisconsin—Sess. Laws, 1925, ch. 124, p. 186.

II. In all but capital cases:

Washington—Rem. Comp. Stat., 1922, sec. 2144.

III. In misdemeanor cases:

Arizona—Rev. Stat., 1913, Pen. Code, sec. 1006: "Issues of fact must be tried by jury unless a trial by jury be waived in criminal cases not amounting to felony, by the consent of both parties, expressed in open court and entered in its minutes."

Arkansas—Dig. of Stat., 1921, sec. 3086, the parties may by consent waive.

California—Pen. Code, 1925, sec. 1042, like Arizona.

Delaware—Sess. Laws, 1927, ch. 233, p. 634.

Florida—Rev. Gen. Stat., 1920, sec. 6075: "The prosecuting attorney and the defendant may waive a jury."

Idaho—Comp. Stat., 1919, sec. 8904, like Arizona.

Kansas—Rev. Stat., 1923, sec. 62-1401: "The defendant and prosecuting attorney with the assent of the court, may submit the trial to the court."

Louisiana—Wolff's Stat., 1920, p. 507, Act 35 of 1880,

sec. 4, waiver in all cases except when punishment is necessarily imprisonment at hard labor or death.

Missouri—Rev. Stat., 1919, sec. 4006.

Montana—Rev. Codes, 1921, sec. 11929, like Arizona.

Nevada—Rev. Laws, 1912, sec. 7122, like Arizona.

New Jersey—Comp. Stat., 1910, Cr. Pr., sec. 13a.

North Dakota—Comp. Laws, 1913, sec. 10770, like Arizona.

Ohio—Page's Gen. Code, 1926, sec. 13676: "A person indicted for a misdemeanor, upon request in writing subscribed by him and entered on the journal, may be tried . . . by the court."

Texas—Rev. Cr. Stat., 1925, Cr. Pr., Art. II.

Utah—Comp. Laws, 1917, sec. 8925.

Virginia—Code, 1924, sec. 4927, with the consent of the attorney for the commonwealth.

West Virginia—Barnes' Code, 1923, ch. 116, sec. 29: "The parties by consent . . . may waive."

IV. In the following statutes provision is made for trial without jury unless demanded by the defendant:

Colorado—Comp. Laws, 1921, sec. 6188, trial in a justice's court.

Georgia—Code, 1926, Pen. Code, sec. 790 (16), in county court cases (misdemeanor). Sec. 790 (53) makes the same provision for city court cases (misdemeanors).

Illinois—Rev. Stat., 1925, ch. 37, sec. 318, provides for trial without a jury in the county courts where the accused waives jury trial. This is for offenses not punishable by imprisonment in the penitentiary or by death. Sec. 204.

Kentucky—Car. Codes, 1027, Crim. Prac., sec. 180, offenses for which the punishment is limited to a fine of sixteen dollars.

Mississippi—Hem. Code, 1927, sec. 2411. Trial in justice's court.

Nebraska—Comp. Stat., 1922, sec. 9991, trial in magistrate's court.

New York—Gil. Cr. Code, 1962, Cr. Pr., sec. 702, in court of special sessions. This is a court of inferior jurisdiction. Sec. 56.

North Carolina—Consol. Stat., 1919, sec. 4627, trial in a justice's court.

Ohio—Page's Gen. Code, 1926, sec. 13451, in a probate court. This court has jurisdiction over misdemeanor cases. Sec. 13424.

South Carolina—Code of Laws, 1922, Cr. Pr., sec. 27, trial in a magistrate's court.

V. In certain special cases:

Colorado—Comp. Laws, 1921, sec. 5790, criminal cases in county courts against minors. But judge may call a jury notwithstanding waiver. Sec. 6187 provides for waiver in assault and battery cases in a justice's court.

Oklahoma—Comp. Stat., 1921, sec. 3011, in cases of indirect contempts.

States in Which Court Decisions Have Upheld Right of Waiver in Absence of Constitutional or Statutory Authority

C. I. The following cases in states having no constitutional or statutory provision authorizing waiver hold that there may be a waiver in the situations noted:

Georgia—Logan v. State, 86 Ga. 266, 268, under a statute which provided that "A person may waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest," the defendant may waive jury in misdemeanor cases.

Illinois—People v. McDonald, 178 Ill. App. 159 (1913), for misdemeanors not necessarily prosecutable by indictment and for which the punishment cannot extend to imprisonment in the penitentiary.

Brewster v. People, 183 Ill. 143 (1899), misdemeanors the punishment of which is fine.

Massachusetts—Commonwealth v. Rowe, 257 Mass. 172 (1926). Court said that there is no constitutional objection to waiver of jury, but the statutes do not confer the jurisdiction on a court to try the case.

Nebraska—Grimes v. State, 88 Neb. 848 (1911), in cases of violations of city ordinances where penalty is a fine.

New Hampshire—State v. Almy, 67 N. H. 274, 280 (1892). Dictum that accused may waive a jury trial in all cases.

Tennessee—Metzner v. State, 128 Tenn. 45, 47 (1913). Dictum that jury may be waived in misdemeanor cases.

II. In the following cases it was held that there may not be a waiver:

Illinois—Harris v. People, 128 Ill. 585, in felony cases.

Iowa—State v. Carman, 63 Iowa 130, under the statute which provides that issues of fact must be tried by jury.

New York—People v. Cosmo, 205 N. Y. 91, 95, dictum, in all cases under the constitutional provisions.

Pennsylvania—Commonwealth v. Hall, 291 Pa. 341 (1928), in court of quarter sessions, in the absence of a statute authorizing it.

Rhode Island—State v. Battey, 32 R. I. 475 (1911). Waiver forbidden because statute required a jury in case of a criminal appeal from a justice's court. But court intimates that a legislature could constitutionally allow waiver both in misdemeanor and felony cases.

Chronology of Efforts Toward Improving Procedure of Courts

1885—In this year and again in 1893, President Cleveland, in messages to Congress, pointed out the incongruity, as well as the hardship on citizens, resulting from the growth through Federal legislation of new kinds of minor criminal offenses without provision for their expeditious or inexpensive disposition. In 1885 he said:

"The multiplication of small and technical offenses especially under the provisions of our internal revenue law, render some change in our present system very desirable in the interests of humanity as well as economy. The district courts are now crowded with petty prosecutions, involving a punishment, in case of conviction, of only a slight fine, while the parties accused are harassed by an enforced attendance upon courts held hundreds of miles from their homes. If poor and friendless, they are obliged to remain in jail during months, perhaps, that elapse before a session of the court is held, and are finally brought to trial surrounded by strangers and with but little real opportunity for defense. In the meantime frequently the marshal has charged against the Government his fees for an arrest, the transportation of the accused and the expense of the same, and for summoning witnesses before a commissioner, a grand jury, and a court; the witnesses have been paid from the public funds large fees and traveling expenses, and the commissioner and district attorney have also made their charges against the Government."

Mr. Cleveland advised that, if not constitutionally objectionable, United States commissioners be authorized to try misdemeanors, at least when the accused consented. He added:

"This abuse in the administration of our criminal law should be remedied, and if the plan above suggested is not practicable some other should be devised."

1893-1922—Various laws were passed by Congress dealing, directly or incidentally with offenses against Federal laws, but none specifically dealt with the question of limiting jury trial.

1922—At the first judicial conference of the Justices of the Supreme Court of the United States and other Federal Judges, Chief Justice Taft called attention to the necessity for improvement in Court procedure to prevent the prevalent congestion of Court calendars. He did not deal specifically with the question of jury trials, but his efforts toward improving Court procedure gave impetus to the general condition of the whole problem.

1926—The Bar Association of the City of New York appointed a special committee to investigate the causes of the congestion of the calendars of the courts of New York and Bronx Counties. A subcommittee was appointed to study conditions in the United States Court for the Southern District of New York.

On May 29, the committee filed a report which was adopted by the Association.

The Committee met again in the autumn of 1926 and, on November 11, began work on recommendations for legislation to improve conditions in the United States Courts.

1927—On December 21, Henry W. Taft, Chairman of the Special Committee of the Bar Association of the City of New York, wrote to Representative George S. Graham (Pa., R.), Chairman of the House Committee on the Judiciary, notifying him of the investigations that had been made by the subcommittee, of which Col. Francis G. Caffey was Chairman, and forwarding to him the Committee's report, together with drafts of three bills designed to remedy the conditions complained of.

1928—In response to requests from the Bar Association of the City of New York, the House Committee voted to hold hearings on the various bills on the subject of jury modification, which had in the meantime been introduced. A subcommittee of the Committee on the Judiciary was appointed to conduct the hearings.

1928—On January 17, the subcommittee, of which Representative Leonidas C. Dyer of Missouri, is Chairman, began hearings, which were continued on February 7 and 14 and on April 25.

1929—On March 4, President Hoover announced in his inaugural address that he would appoint a special commission to make a thorough study of the entire problew of law enforcement in the United States. He said:

"I propose to appoint a national commission for a searching investigation of the whole structure of our federal system of jurisprudence, to include the method of enforcement of the 18th Amendment and the causes of abuse under it. Its purpose will be to make such recommendations for reorganization of the administration of the federal laws and court procedure as may be found desirable."

1929—On April 22, President Hoover, in an address before the annual meeting of the Associated Press in New York City, declared law enforcement and obedience to the law to be "the dominant issue before the American People."

1929—On May 20, President Hoover announced the membership of the National Commission on Law Observance and Enforcement.

1929—On May 28, the Commission met at the White House to organize. On that occasion the President expressed the wish that the Commission investigate and report on all phases of law enforcement.

1929—Shortly after the Commission was organized the various bills for jury reform pending before the House Committee on the Judiciary were sent to the Commission for comment.

1929—On November 1, the House bills for jury modification were still before the National Commission on Law Observance and Enforcement.

Modern Movement for Modification of the American Jury System

Col. Francis G. Caffey,
Member of the Bar Association of the City of New York

FOUR years ago a committee was appointed by the president of the Bar Association of the City of New York to inquire into the conditions of the congestion in New York and Bronx Counties, constituting the first judicial department. In that first judicial department sits the District Court of the United States for the Southern District of New York; and our inquiries were directed at the State and Federal Courts. A subcommittee was appointed to inquire into the Federal Courts.

In May, of 1926, we made a report to the association, which was adopted.

Congestion in New York Federal Courts

It reaches the conclusion that it requires, or did at that time require, on the average over one and one-half years to reach the trial of a case after it is added to the calendar. That is applicable to common-law cases, equity cases, and other types of civil cases. So far as criminal cases are concerned, they are not tried in the order in which they are added to the calendar, but are put on the calendar and brought to trial as the district attorney determines is in the interest of a proper administration of his office.

Minor Federal Cases

One of the ways in which congestion had grown up was in the tremendous multiplication of small cases. This congestion had grown up largely during and following the war.

Now, there are a good many laws under which these small cases are prosecuted in New York; the principal kind, of course, being the liquor laws. Among the other laws are the navigation laws. In a large harbor like New York, we have a great many petty cases under the anti-narcotic acts, and under the various theft acts—laws relating to the post office or interstate commerce, and quite a good many under these various statutes like the food and drug act, insecticide act, and other laws that are administered by the executive departments.

Bar Association's Research Program

And so we reached the conclusion recommended in that report, that there should be an attempt to devise a better method of handling those minor cases.

In the autumn of 1926, we had a further meeting of the committee, and a program of research into the facts and into the various legal questions, particularly the constitutional questions, was laid out.

That program of research was carried out; and about September, 1927, we began the formulation of proposed bills. Those bills went through a great many drafts. In December they were put into final form; and they were embodied in this report made to the bar association.

Congressional Legislation Covering Petty Cases

In the course of our researches we went back into the records of Congress of 1823, and sought to discover material there bearing upon efforts made from time to time in the past 100 years to devise means for the handling of police cases. Throughout the history of the Government there have been created offenses, many of which are of the type that, under the State laws, are regarded and treated and disposed of as police cases. So, also, in all the areas for which Congress legislates more directly than for the country at large, such as the District of Columbia, the Territories, and the national parks, Congress, from time to time (substantially along the same lines as the States have done), has created tribunals for the handling of police cases.

So that in the course of our investigations we have found many illustrations of proposals to legislate along the lines of the States and of the special areas for which Congress legislates.

As the result of careful consideration and study of those precedent proposals, and of that precedent legislation by Congress itself, that, except in the form in which this is put together, and except as to certain minor procedural provisions, there is no salient feature in these bills that has not been pending before Congress for many, many years, and for which there cannot be found, in bills introduced years ago in Congress, a formal precedent.

An Old Problem

In other words, we have not made any new discoveries, and are not proposing anything that is very new. The matter with which we attempt to deal is no different from a situation that has existed in this country almost from the foundation of the Government. That is to say, that under the laws of the United States, there exist a great many offenses which are of a police nature, and for the country at large there has never been provided by Congress any device, tribunal, or means for handling cases of that type similar to those provided by Congress in the special areas for which it legislates, and those provided by the States.

Now, in this report, I have quoted at some length a message to Congress by President Cleveland in 1885 in which he discussed the very grave injustice that is suffered and always has been suffered, by defendants in these minor cases, through the lack of machinery and opportunity for the early disposition, and the inexpensive disposition, of their cases.

Purposes of Proposed Legislation

I hope that, by this proposed legislation, without the increase in number by a single official; with a lessening of expense to the Government itself; and with a decrease in the expense to the defendants themselves; and without trespass upon the constitutional rights of any individual, this business, by very slight changes such as those proposed in this legislation, can be disposed of with a saving of approximately half the time of the district judges of the United States now devoted to criminal cases.—*Extracts, see 3, p. 268.*

Resolutions and Bills for the Modification of the Jury System

OWING to the fact that the House Committee on the Judiciary was not organized for the present extra session of Congress no bills or resolutions are officially before the committee for consideration. All bills so far introduced during the present session, except those that have been referred to the few committees that are organized, are still in the hands of the Speaker of the House for reference to the proper committees when they are organized at the opening of the first regular session of the Seventy-first Congress, which will convene on December 2, 1929.

With the exception of the bill introduced by Representative R. Walton Moore, Va., D., all the House bills relative to the jury system were introduced in the last Congress and were before the Committee on the Judiciary when that Congress ended on March 4, 1929.

Representative Leonidas C. Dyer, Mo., R., chairman of the subcommittee of the Committee on the Judiciary which, in the Seventieth Congress, conducted hearings on the various bills for modification of the jury system, announced on October 30 that he would reintroduce his resolution for an amendment to the Constitution (printed in full below) and that he expected that the bills on which hearings were held by his subcommittee last year or bills similar to them would be introduced during the present Congress and would receive consideration by the committee.

The New York City Bar Association Bills

The following three bills H. R. 8555, H. R. 8230 and H. R. 8556, 70th Congress, first session, were prepared by the Bar Association of the City of New York and introduced at its request by Representative Moore, Va.

H. R. 8555, Seventieth Congress, First Session

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a district court of the United States may, by rules made hereunder, provide that, in any criminal case, of which it has jurisdiction, in which the offense charged is a misdemeanor only, any United States commissioner appointed by it may take a written plea of guilty, or if the accused waive a jury trial may hear the evidence on a plea of not guilty, and file in the district court a report of the case, with his recommendation of what judgment should be entered therein. Nothing herein shall be construed to deprive a defendant of his right to a hearing by the district court before entry of judgment in a case in which he has pleaded guilty or to a trial by the district court in a case wherein, on his plea of not guilty, the commissioner has recommended a judgment of guilty.

Sec. 2. The Supreme Court of the United States may, from time to time, revise or altar the rules hereunder made by any district court or may make rules applicable in all districts for the efficient enforcement of the provisions of this act.

Sec. 3. For their services pursuant to this act United States commissioners shall be paid fees, at rates prescribed by the rules made hereunder, not exceeding $——— for each case of which a report is made.

H. R. 8230, Seventieth Congress, First Session

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all misdemeanor cases within the jurisdiction of the district courts of the United States, where the accused would not, by force of the Constitution of the United States, be entitled to trial by jury, the trial shall be by the court without a jury; and such cases may be prosecuted by information.

Sec. 2. In all prosecutions within the jurisdiction of said courts in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury, unless the accused shall, in open court, expressly waive such trial by jury, and request to be tried by the court, in which case the trial shall be by the court without a jury, and the judgment and sentence shall have the same force and effect in all respects as if the same had been entered and pronounced upon the verdict of a jury.

Sec. 3. Adjudication of the invalidity of any part of this act shall not invalidate or affect any other of its provisions.

H. R. 8556, Seventieth Congress, First Session

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this act shall be known as the commissioner's court act. For its purposes the terms hereinafter employed shall have the meanings, respectively, as follows: (a) "Judicial council," the conference of judges pursuant to section 2 of the act of September 14, 1922, entitled "An act for the appointment of an additional circuit judge for the fourth judicial circuit, for the appointment of additional district judges for certain districts, providing for an annual conference of certain judges, and for other purposes" (Forty-second United States Statutes

at Large, chapter 306, page 837), or any amendment thereto; (b) "district court," the district court of the United States; (c) "district," the judicial district within which the district court has jurisdiction; (d) "commissioner's court," an inferior court of the United States to be called United States commissioner's court; (e) "judicial commissioner," United States judicial commissioner; (f) "civil case," a suit at law for the recovery of money only of which jurisdiction is vested in a district court; (g) "criminal case," a prosecution for an offense against the United States of which jurisdiction is vested in a district court.

Sec. 2. There is hereby created, in and for each district, a commissioner's court, which shall be a court of record and shall have a seal in the form prescribed by the rules made hereunder.

Sec. 3. A commissioner's court is authorized, without a jury, to try and adjudge (a) and civil or criminal case in which the Constitution of the United States does not require a trial by jury; (b) any civil case wherein the value in controversy shall not exceed $1,000 and a trial by jury shall not have been demanded in writing by either party in accordance with the rules made hereunder; and (c) any criminal case wherein a misdemeanor only is charged, for which the maximum punishment prescribed by law does not exceed imprisonment for one year of a fine of $1,000 or both, and wherein the accused shall not, within the time, after arraignment, fixed by the rules made hereunder, have demanded a trial by jury. Failure to make such demand, in compliance with the rules made hereunder, or consent to the transfer of a case from a district court to a commissioner's court, shall constitute a conclusive waiver of any right to a trial by jury .

Sec. 4. A circuit or district judge may hold a commissioner's court in any district in which he is authorized to sit in the district court. A district court, of its own initiative or on motion of either party, may transfer from itself to a commissioner's court or to itself from a commissioner's court any case of which this act vests jurisdiction in a commissioner's court. Any such criminal case may be prosecuted by information.

Sec. 5. There is hereby created the office of judicial commissioner. Upon recommendation of the district court for any district certified by its senior district judge, the judicial council is authorized to determine, from time to time, whether there is occasion, in the interest of economy and expedition, for the appointment therein of a judicial commissioner or commissioners. Whenever, and not until, the judicial council has determined that such occasion exists in any district, the district court therein shall, with the approval of the United States circuit court of appeals for the circuit in which it is located, appoint such commissioner or commissioners, who shall be learned in the law, shall reside in the district for which appointed and shall hold office during good behavior. A determination by the council may be evidenced by a certificate of the Chief Justice of the United States. The clerk of the district court for any district to which such certificate relates shall file it and enter it in the minutes of the district court.

Sec. 6. Any judicial commissioner may hold a commissioner's court in the district for which he is appointed and shall have all the jurisdiction, powers, and duties of a United States commissioner.

Sec. 7. A judicial commissioner shall receive a salary at the rate of $——— annually, which is hereby appropriated for that purpose out of any money in the Treasury not otherwise appropriated. Such salary shall be paid in the same way as the salary of a district judge. All fees collected by a judicial commissioner shall be paid to the clerk of the district court and by the latter covered into the Treasury of the United States. Estimates by a commissioner's court of its expenses during the next fiscal year shall, after approval by the district court, be furnished annually to the Attorney General by the date he shall prescribe.

Sec. 8. The clerk of the district court shall be ex officio the clerk of the commissioner's court for the district. The duties and powers of the marshal with respect to the commissioner's court shall be the same as those provided by law, with respect to the district court. A judicial commissioner, with the approval of the district court, is authorized to employ a stenographer, who shall receive a salary fixed by the court, at not exceeding $——— annually, payable in equal monthly installments, which is hereby appropriated for that purpose out of any moneys in the Treasury not otherwise appropriated. The stenographer shall be subject to the direction of the commissioner employing him and, when required by the commissioner or judge holding a commissioner's court, shall furnish as many copies as needed for official use of the minutes, approved by the commission or such judge, of the testimony and other proceedings in any case, or the commissioner or such judge may make and approve the minutes. For other copies of the minutes furnished by the stenographer he may, in addition to his salary, receive payment at rates not exceeding those fixed by the rules made hereunder.

Sec. 9. An appeal shall lie in any civil case and, except from a judgment of acquittal, in any criminal case from the commissioner's court to the district court. Such appeal shall be taken by filling a notice thereof in the commissioner's court within thirty days after judgment therein and shall be prosecuted in compliance with the rules made hereunder. It shall be heard on the original papers, and record of proceedings, including the minutes, in the case before the commissioner's court. On such appeal the district court, as justice shall require (a) may affirm or reverse the judgment of the commissioner's court, or (b) without granting a new trial may alter the judgment or may diminish or increase the sentence within the limits prescribed by law for a judgment or sentence by the commissioner's court in the case, or (c) may direct a new trial either before itself or in the commissioner's court. Whenever the disposition of such case by the district court shall be final there shall be no review thereof except that (a) the Supreme Court, under rules made by it, when a constitutional question is involved, or (b) the proper United States circuit court of appeals, under rules made by it, whatever the question involved, may, in its discretion, grant a review thereof. Application for such review must be made within three months from the date of entry of the final judgment or order of the district court in the case. In any such criminal case there shall be no supersedeas or stay of execution of a judgment of the Commissioner's court during the pendency of such appeal or of a judgment of order of the district court during the pendency of such review unless first a circuit judge authorized to sit in the circuit, or a district judge authorized to sit in the district, shall certify that there is reason-

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The Dyer Resolution

On December 9, 1927, Representative L. C. Dyer, Mo., R., introduced in the House a joint resolution, H. J. Res. 83 (70th Congress), which was referred to the Committee on the Judiciary. No action was taken by the committee. The full text of the resolution follows:

RESOLVED by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislature of three-fourths of the several States, shall be valid to all intents and purposes as part of the Constitution.

ARTICLE XX

Section 1. The right of trial by jury shall be secured to all, and remain inviolate, but in civil and criminal actions three-fourths of the jury may render a verdict.

Section 2. Whenever in the opinion of the judge of a district court about to try a civil action or a defendant or defendants against whom has been filed any indictment for a felony, the trial is likely to be a protracted one, the court may cause an entry to that effect to be made in the minutes of the court, and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or two additional jurors in its discretion, to be known as "Alternate jurors," with the same qualifications as the jurors already sworn and be subject to the same examination and challenge: Provided, That the plaintiff, plaintiffs, or prosecution shall be entitled to one, and the defendant to two peremptory challenges to such alternate jurors.

Section 3. Such alternate jurors shall be seated nearby with equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors selected, and must attend at all times upon the trial of the cause in company with the other jurors, and for a failure so to do are liable to be punished for contempt. They shall obey the orders of the court and be bound by the admonition of the court, upon each adjournment of the court, but if the regular jurors are ordered to be kept in the custody of the marshal during the trial of the cause, such alternate jurors shall be kept in confinement with other jurors; and except, as hereinafter provided, shall be discharged upon the final submission of the case to the jury.

Section 4. If, before the final submission of the case, a juror die, or become ill, so as to be unable to perform his duty, the court may order him to be discharged and draw the name of an alternate who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors.

Section 5. Congress shall have power to enforce this article by appropriate legislation.

The Moore Bill

On April 23, 1929, Representative R. Walton Moore, Va., D., introduced in the House the following bill, H. R. 1809, which was referred to the Committee on the Judiciary:

BE it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all criminal prosecutions within the jurisdiction of the district courts of the United States, the trial, except as otherwise provided by law, shall be by jury, unless the accused shall in open court expressly waive such trial by jury and request to be tried by the court, in which case the trial shall be by the court without a jury, and the judgment and sentence shall have the same force and effect in all respects as if the same had been entered and pronounced upon the verdict of a jury. If, however, defendants jointly charged elect differently hereunder with respect to trial without a jury, the court, in its discretion, may either require all to be tried by jury, or allow each to be tried with or without a jury as he requests, or together try without a jury those waiving a jury trial and with a jury those not waiving a jury trial.

Sec. 2. A district court of the United States may, by rules made hereunder, provide that, in any prosecution within its jurisdiction for a misdemeanor only, any United States commissioner appointed by it may take a written plea of guilty, or if the accused in writing waive a jury trial may hear the evidence on a plea of not guilty, and file in the court a report of the case, with his recommendation of what judgment should be entered therein. Nothing in this section shall be construed to deprive a defendant of his right to a hearing by the court before entry of judgment in a case wherein he has pleaded guilty or to a trial by the court in a case wherein on his plea of not guilty, the commissioner has recommended a judgment of guilty.

Sec. 3. All misdemeanors, except those punishable by imprisonment in a penitentiary or at hard labor or otherwise infamous, may, without prior leave of court, be prosecuted by information.

Sec. 2. In all misdemeanor cases within the jurisdiction of the district court of the United States wherein the accused would not, by force of the Constitution of the United States, be entitled to trial by jury, the trial shall be by the court without a jury. The procedure prescribed by section 2 may be followed, upon written consent of the accused, in all such cases wherein there are pleas of not guilty, with the same force and effect as if those cases were expressly included in that section.

Sec. 5. The Supreme Court of the United States may, from time to time, revise or alter the rules made hereunder by any district court, or may make rules applicable in all districts for the efficient enforcement of Section 2.

Sec. 6. For their services pursuant to this Act United States commissioners shall be paid fees, at rates prescribed by the rules made hereunder, not exceeding $ for each case of which a report is made.

Sec. 7. Adjudication of the invalidity of any part of this Act shall not invalidate or affect any other of its provisions.

Is the Jury System as an American Institution Wholly Satisfactory?

Pro

HAROLD H. CORBIN,
Member of the New York Bar

I BELIEVE in the jury. I believe in its present-day efficiency. I believe it the most practical and most satisfactory arbiter of issues of fact in civil actions, whether such actions fall within the legal classification of "actions upon contract" or "actions for torts." I know that juries make mistakes; they may commit grievous errors. What human agency is perfect But their ever-changing personnel prevents such errors from becoming precedents for future use.

In human institutions the question is not whether every evil contingency will be avoided, but what arrangement will, on the whole, be productive of the most satisfactory result. I deny that any single judge, or group of judges, will give to the true administration of justice, any more satisfactory service as the final arbiter of issues of fact than does the jury—an abstract as it has been called, of the citizens at large.

Thirty years ago Joseph H. Choate said: "So let me say, and again upon the same authority of personal experience and observation, that for the determination of the vast majority of questions of fact arising upon conflict of evidence, the united judgment of twelve honest and intelligent laymen, properly instructed by a wise and impartial judge, who expresses no opinion upon the facts, is far safer and more likely to be right than the sole judgment of the same judge would be. There is nothing in the scientific and technical training of such a judge that gives to his judgment upon such questions superior virtue or value. . . ."

The experience of the years and the experience of the day teach the verity of the conclusion of that erudite lawyer.

The first and, to me, the most untenable charge against the jury is the charge that it is slow and impedes the disposition of cases. This count may be popularly attractive at the present time when the law's delays have had so much public censure. But for how much of this justly deplored delay can the jury be held responsible? Clients constantly complain of the two or three years' time that elapses before their cases are reached for trial; but what lawyer can tell of hearing a single client complain of delay when his case is reached for trial because of its being tried before a jury rather than before a judge? From the moment the jury trial begins it is full of action; it proceeds with expedition under the guidance of the judge; the verdict is rendered upon the trial instead of some weeks or months later, as is too often the case when tried without a jury. Judge Proskauer says that a trial judge could dispose of three times as many contract cases without a jury as with one. Mr. Choate says of this objection of delay: "but I deny the charge absolutely and altogether. There is nothing in the whole realm of litigation so short, sharp and decisive as the

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Con

JOSEPH G. SWEET
Member of San Francisco Bar

IF we are to arrive at any correct appraisal of the jury system we must consider three elements: (1) the probable mental caliber and capacity of self-control of the persons constituting the jury; (2) the nature of the problems required to be passed upon by that jury; (3) the conditions under which they are required to reach conclusions based upon the facts proved.

1. The old-fashioned democratic doctrine was that all men were created free and equal. Probably, the originators of this doctrine really meant that all persons were born with a right to make themselves, by honest effort, the equals of any other person. However, many Americans came to construe democracy to mean that all persons had equal capacities for the performance of all duties.

The present day jury system seems to have been generated by belief in the latter assumption. If all men are equal, the judgment of twelve ignorant, untrained men is at least as good as the considered conclusion of one intelligent and trained mind. If we assume that all persons —male and female—without regard to native ability, color, or experience, have the understanding requisite for making correct decisions based on intricate facts, then the jury system is a reasonably good means for rendering justice between litigants.

However, this is obviously not the case. The researches of psychologists and scientists and the experience gained from examining large numbers of men during the late war have demonstrated that humans are born with varying mental capacities.

The mental tests given 93,365 enlisted men chosen by draft during the World War, showed the average mental age of these persons to be thirteen and one-tenths years. The mental age of the average white soldier was that of a child between the ages of thirteen and fourteen. It was found that 52.7 per cent were from thirteen to sixteen years in mental age. The remainder were lower in the mental scale. Of 6,188 seniors tested in 320 high schools in Indiana under a system which classified the intelligence in A, B, C, D, E, and F grades, it was found that twenty-six per cent were of D, E, or F grades of intelligence.

It is probable that persons chosen for jury service, taken as they are from all ranks of life, represent about the same cross-sections of our population called to the colors by the draft.

It is true that many persons chosen as jurors have had a broader experience in life than the young men chosen for military service. However, the intelligence tests have demonstrated that experience does not increase mental capacity—the ability to deal with new problems. And the duties imposed upon jurors usually require the exercise of faculties not generally called into use by the exigencies of every day life.

It will, I think, be generally conceded that the drawing

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ordinary jury trial." Judge Proskauer says that "Most of the time in our courts is not consumed with the adducing of evidence, it is chiefly occupied with controversy and discussion as to the manner in which the evidence shall be adduced." Shall we blame the jury for this? The same rules of evidence apply and the same "controversy" and "discussion" occur whether the trial be with or without a jury; in fact, the judge necessarily decides many questions on the trial of a jury case which he would reserve for post-trial consideration were no jury present. Every trial counsel knows that it is dangenerous and often fatal to tire a jury with an objecting attitude; he knows that nothing in the course of a jury trial does more harm to a client's cause than that he shall continually voice the humdrum "incompetent, irrelevant and immaterial" objections. Jurors are business men and silently demand that trials move with dispatch consistent with deliberation. Judge Proskauer refers to the "frittering away of time upon opening and summations." Where the trial is before a judge alone, counsel invariably make an opening; they must inform the court what the case is about, what they regard the issues to be and briefly sketch the evidence they expect to introduce. Perhaps they do it in slightly less time than they take to state the same things to a jury, but the difference is negligible. So far as summations are concerned they consume infinitely less time than the preparation of briefs and findings, the exchange of briefs between counsel and the filing of reply briefs, so often required where the trial is without a jury. We sometimes wait several weeks for testimony, or portions of it, to be written out before preparing our briefs after trials before a judge or referee. I have very distinctly in mind a trial during which the exposition, observations and personal experiences recounted by the judge presiding consumed more time than the summation of counsel. On the other hand we see some judges striving for a record in the number of cases disposed of and publication of the figures in the daily press. The pendulum swings both ways. Who can fairly say how long any trial should last?

The second count of the indictment against the civil jury is that it lacks the experience and ability to understand and fairly determine the cases tried before it. It is said that we must have a mind trained in the science of sifting fact from fiction and that the legal mind of the jurist is best equipped to meet the requirements of an able and impartial arbiter. Some writers urge the extinction of the jury in contract cases alone; others in all classes of civil cases, others in both civil and criminal cases. I am not concerned here with the abolition of the jury in criminal cases. It has stood and always will stand as the only bulwark between the security of the individual and the oppressive use of power by the state.

I am particularly unimpressed with the notion that juries cannot grasp the points at issue in complicated cases. The word "complicated" is often a misnomer, for the case that seems complicated to the observer who enters the courtroom for an hour or a day during a long trial narrows itself to one or a very few clearly demarked issues of fact that are finally submitted to the jury. Even in the case that may properly be termed complicated. there are, after all, only more numerous questions of fact to be decided than ordinarily. The ease with which these are disposed of depends largely upon how well the

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JOSEPH G. SWEET—*Continued*

of correct inferences from new and complicated sets of facts is one of the most difficult mental feats. This is what is required in trials at law. May it properly be trusted to persons without previous experience and, on the average, with the mental age of a thirteen year old child?

2. Let us consider the nature of the problems that jurors are called upon to decide.

Are jurors, as a class, mentally qualified to reach a sound conclusion as to which of two experts is correct in his testimony concerning the quality of oriental imports? Are they capable of weighing the testimony of rival geologists?

Litigation arising out of tortious injury to the person furnishes work for most of the juries in our larger cities. The extent and nature of the injury must be established largely by medical testimony. Is a juror who thinks the humerus must be a joke competent to decide between the well qualified Dr. A., who testified that the plaintiff has no demonstrable injury and Dr. B., of doubtful reputation, who gravely swears that the bruising of the os calcis may ultimately produce a tumor of the medulla oblongata?

Are people of average mentality, untrained in the practice of self-restraint and the exercise of judicial faculties, capable of laying aside sympathy and prejudice so that the case may be decided on its merits?

The obvious reply is that judges are not infallible. This is true. But judges are of necessity persons with certain mental attainments. They have been trained to act with restraint, to weigh facts and investigate the relative merits of conflicting theories. More than this, they are not required to decide on the instant—reflection and study may be called in to aid in the decision of the case.

3. Are the conditions under which juries are required to make their decisions such that an intelligent decision might be expected from intelligent persons?

Our appellate courts blandly assume that each juror heard and remembered all of the testimony. This, though, the trial consumed weeks. A careful judge, trained to remember testimony, will generally require parts of the testimony to be written up for his use where the case is close and of long duration. Counsel, familiar with the facts in advance of trial, have portions of the testimony transcribed for use in argument to the jury. All recognize that trained minds cannot assimilate all of the evidence and, still, we assume that untrained minds of ordinary intelligence have.

The fact that a jury is composed of twelve persons adds to the difficulty. Twelve persons, seeing a football game, will differ radically upon details and essentials. Twelve persons listening to testimony as elicited on the witness stand, upon subjects foreign to their experience, and forced to reach a conclusion must inevitably render a verdict that is based upon hazy recollection and which is the result of compromise and contest.

And the jury, in most states, must pass upon all issues of fact—must decide them in one gulp. The speed of automobiles, the credibility of strange witnesses, the relative skill and honesty of physicians must be settled at one sitting.

And the instructions! They are usually read to the jury by the judge and the reading may take anywhere from twenty minutes to two hours. Abstract propositions of law are read to twelve persons who know nothing of legal principles and, on the instant, these persons

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Pro

HAROLD H. CORBIN—*Continued*

court performs its function of defining the issues and where there are long and complex accounts to be examined the court has ample power to direct that the issue thereon be heard and determined before a referee.

Of all the objections to trial by jury, the one most often urged, and with perhaps the best foundation, is this point that the jury does not possess the art of the judge of analyzing evidence. But I maintain that, of far greater value than an extended courtroom experience with the analysis of evidence, is the ability, which so many judges and lawyers lack, of comprehending the mental situation of a witness, drawn, like the jurors themselves, from a world outside courtrooms and away from the harassing formalism of the legal field. Such understanding alone affords the true basis for proper investigation and decision. The mere fact that the judge sees more witnesses on the witness stand in the course of a year than does the jury, does not qualify him, in my opinion, as the better judge of witnesses. In fact that very experience sets up in the judge's mind a particular code by which he judges all witnesses. His work becomes, of necessity, systematized. Each judge will develop a system of his own which to him, becomes orthodox—his method a rule. What that standard or rule shall be depends upon his individuality, his personal contacts and associations, and upon the particular school of thought to which he belongs.

The jury of twelve, on the other hand, is not subject to any such mental hardening of the arteries. It maintains a constant flow of new blood, straight from the popular heart.

As one of our early jurists said:

"Juries undoubtedly may make mistakes; they may commit errors; they may commit gross ones. But changed as they constantly are, their errors and mistakes can never grow into a dangerous system. The native uprightness of their sentiments will not be bent under the weight of precedent and authority. The *esprit de corps* will not be introduced among them, nor will society experience from them those mischiefs of which the *esprit de corps,* unchecked, is sometimes productive. Besides, their mistakes and their errors, except the venial ones on the side of mercy made by traverse juries, are not without redress. The court, if dissatisfied with their verdict, has the power and will exercise the power, of granting a new trial. This power, while it prevents or corrects the effects of their errors, preserves the jurisdiction of juries unimpaired."

It does not take legal science to determine whether a witness is lying or truthful; indeed, I sometimes think such training is a handicap. Too often has obscurity been introduced by judicial finesse itself, necessitating even greater feats of legal balancing and deduction to reach the light. Each jury is a fresh and open field, unburdened by law, but equipped with a thorough, first-hand understanding of its fellow-beings. If it lacks the art of analysis claimed for the jurist, it likewise lacks the limits of that art, the cynicism, the formalism, the tendency to bow to precedent, the aloofness from mankind.

The last count against the jury is that it rest chiefly upon tradition. Its critics anticipate the argument that it has had hundreds of years of experience and that its first roots were planted in the soil of political dispute seven, eight and nine hundred years ago. They show

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JOSEPH G. SWEET—*Continued*

are asked to apply these legal principles to facts which they may have forgotten.

Formerly, appellate courts assumed that the jury understood each instruction given, in the exact language in which it was read. The instructions were carefully scrutinized and reversals for erroneous instructions common. As time passed, the courts of appeal apparently unconsciously reached the conclusion that the instructions didn't count for so much after all and so the rules were liberalized. Nowadays, it is the fashion to assume that the jury understood the instructions as a whole and harmonized them and that one erroneous instruction was of little consequence, if the general tenor of the instructions was in accordance with law. The latter assumption is perhaps worse than the former. Everyone recognizes that the jury did not understand all of the instructions. No one can say that the erroneous instruction was not the only one remembered and applied by the jury. Either way we take it, it is pure speculation.

The consideration of a few instructions reveals the absurdity of the whole system. Fancy a jury composed of twelve average laymen understanding, rememberirg and applying forty separate instructions, of which the following are types:

(a) In an action for damages for personal injuries, the defendant meets and overcomes plaintiff's prima facie case when he balances it evenly, without proving absence of negligence by a preponderance of evidence, or by offering evidence tending to show that plaintiff's injuries were the result of an unavoidable accident.

(b) The defendant in his answer has raised the question of contributory negligence. Contributory negligence is such an act, or omission, on the part of a person amounting to want of ordinary care, as concurring or cooperating with the negligent act of the defendant was the proximate cause of the injury complained of.

(c) If you find from the evidence that the plantiff was guilty of contributory negligence, and that such contributory negligence was a concurring and proximate cause of the accident, it does not matter whether the chauffeur in charge of the automobile in question was negligent, for under such circumstances, your verdict must be against the plaintiff and in favor of the defendant.

(d) The law will not weigh the degree of negligence of contending parties. Therefore, I charge you, even though you should find the chauffeur in charge of plaintiff's car was to some extent negligent, yet if you find that plaintiff was negligent in the slightest degree, and that such negligence was a concurring and proximate cause of the accident, he cannot recover and your verdict should be for the defendant.

If twelve lawyers, not familiar with the trial of tort cases, should be placed in a jury box and the usual set of instructions read to them, they would spend hours arguing over the law given them by the court. This is just one more of the patent absurdities underlying our present jury system.

The tendency of modern life has been toward the scientific solution of business and social problems. The stress and complexity of our highly developed civilization demand that this shall be so.

In the days when litigation had to do largely with local problems, when those problems were simple, and when

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Are Jury Trials Fairer to the Accused Than Trials by Judges?

Pro

HENRY CLAY CALDWELL,
Late Judge of the U. S. Circuit Court of Appeals, Eighth Circuit

THE twelve men summoned from the body of the people represent, in their several persons, different pursuits and occupations in life. Their prejudices if they have any, resulting from their varied pursuits and environments, counteract each other; but the single judge, having no counterpoise, his bias and prejudice find full and unrestrained expression in his judgments. He is, besides, constantly struggling to force his decision into the groove of precedent, and to that end keeps on pursuing precedent and analogies and refining and refining until he grows "Wild with logic and metaphysics" and loses sight of the facts and merits of the case in hand. Juries performing casual service only can never acquire the bad habit of fixed tribunals of deciding mechanically upon some supposed precedent.

Moreover, the consequences of an erroneous verdict by a jury are immeasurably less than an erroneous verdict by the judge; for one jury is not bound by the error of a former jury, but the law of precedent will compel the judge to adhere to his error, for it is a rule of fixed tribunals that consistency in error is to be preferred to a right decision. Judges as judges of the facts, have all the faults but not all the virtues of juries. When you impeach the impartiality and integrity of the jury you impeach the impartiality and integrity of the whole body of the people, from whom they are drawn, and of which they are a representative part. Our idea of the prejudices of men is gained by our own prejudices. The difference between a prejudiced man and an enlightened one is the difference between the man who opposes our views and the man who agrees with our views. It is the old aphorism on orthodoxy and heterodoxy over again. It is always implied in this charge against the jury that there is a tribunal that is free from bias, passion or prejudice, and that that tribunal is found in the judge.

It is said that jury trials protract litigation, but the errors that lead to new trials and appeals and writs of error and the reversals of judgments and protraction of litigation are the errors of the judges. Look into the reports and you will find that in the trial of commonplace cases the trial court is charged with the commission of from five to fifty errors of law, and frequently convicted on some of the charges. And the errors of judges are not limited to the courts of original jurisdiction. The appellate courts themselves are constantly falling into error. If one is curious to know the extent of these errors, let him consult Bigelow's Overruled Cases, where he will find that the appellate courts, as far back as 1873, had overruled nearly 10,000 of their own decisions. How many they have overruled since that time is not known. These are their confessed errors only; there still remains, we know not how many, errors not yet confessed, for judges, like all great sinners, never confess their errors until *in extremis*—and not then with

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Con

HAL W. GREER
Lawyer, Beaumont, Texas

I STATE my objections to trial by jury in criminal cases as follows:

First. They do not apply the exact definitions of crimes given in charge by the Court because: (1) they do not understand them, for it requires a student of the law itself to do so; (2) they do not care to understand them, because the conduct of the trial convinces them they are supreme and have the right to consult their own whims, instead of such definitions.

Second. They read into the law their own emotions, sympathies and feelings, giving it: (1) their own interpretation, which will "neither excuse nor justify" the crime from a legal point of view; (2) "putting themselves in the place of the defendant," a position never contemplated by either the law or good morals.

Third. Sometimes (though this is extraordinarily seldom) they are corrupted either through fear, or worse motives, and return a verdict in defiance of the law.

Fourth. Their verdicts are often rendered upon prejudice, though they may not be conscious of it at the time, for instance, the "reasonable doubt" is nearly always disregarded where a tramp or pauper is defendant, and they put on him the burden of proving his innocence; whereas as against a well-to-do citizen, tried on practically the same charge, the "reasonable doubt" is stretched into most unreasonable excuses for acquittal.

Fifth. The method of selecting a jury in criminal cases particularly those punishable with death, is childish and puerile; for the corrupt juror, or one who can be or has already been "influenced" improperly, will answer all questions qualifying himself, as he has no conscience to stultify; whereas the conscientious juror is sure to be inveigled into admitting he "has formed or expressed an opinion," or "is biased or prejudiced in favor of or against the defendant," or the like. Now a man who is truthful and honorable enough to admit that he has formed or expressed an opinion (unless he is doing so falsely to escape unpleasant jury service), or has a prejudice in the matter, will most probably be conscientious in observing his oath, "To try the case according to the evidence submitted under the rulings of the Court, and the law as given in charge by the Court," and no more reason can be had for rejecting him on such grounds than for rejecting the *nisi puris* judge, or the Judges of Appellate Courts, who have read accounts of the crime in the newspapers.

Sixth. The whole effort of the defendant's counsel is to keep his client from being tried by men known to be in favor of enforcing the law, and who cannot be appealed to, to violate their oaths and try the case upon emotions, feelings or sentiments the law does not recognize.

Seventh. The law itself is conscious of the fact that jurors can be improperly "influenced," in that in felony

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Pro

HENRY CLAY CALDWELL—*Continued*

that openness, fullness and frankness supposed to be essential to insure spiritual salvation for a sinner. In a volume of the reports of the Supreme Court of Nebraska is an official list of 111 cases previously decided by that court which have been overruled by the same court.

Judges make hundreds of mistakes in deciding the law where the jury makes one in deciding the facts; and when juries do err, it is commonly owing to the mistake of the judge in instructing them erroneously or inconsistently on the law. A jury after receiving a two-sided charge from the judge were unable to agree and when they were discharged the judge asked them how they stood, to which their foreman replied: "Just like your honor's charge, six to six." When the judges learn to decide the law with as much accuracy and fidelity as juries do the facts, it will be time enough for them to indulge in censorious criticism of the jury for their supposed mistakes. Such action is not only a gross invasion of the rights of the jury, but it is an invasion of the constitutional rights of the suitor, who is entitled to have a jury in the box who will not be influenced in any degree in the honest and independent exercise of their own opinion by fear of censure or the hope of applause from the judge. The free, independent mind has one opinion, and the trammeled, dependent mind another opinion; and the free, independent mind is what every suitor is entitled to have in the jury box.—*Extracts, see 6, p. 288.*

Pro

CONNOR HALL,
Of the Huntington, West Va., Bar

TO defend the jury so far as its own existence is concerned is a superfluous task. It does not trace its origin to any Constitution of Clarendon, Magna Charta or any other definite act of a given time, but is the slow development of a long period; is thoroughly imbedded in English and American institutions and its abolition is no more likely than the abolition of *habeas corpus.* Nevertheless it is not out of place to take some notice of the criticisms which have been made upon the jury particularly as a civil institution from time to time by a number of persons including even students of history and Constitutional Law. It can never be out of place to help instruct a people in the value of their institutions. It might seem strange that the jury which has developed naturally and has existed only because it was adapted to the needs and wishes of the people and for which it has been necessary to wage the fiercest battles with arbitrary governments should be assailed even with apparent bitterness.

But taking up the jury as a civil institution we find that the usual criticisms are the lack of agreement, while unanimous consent is required; that the jurors are not only untrained in many specific problems coming before them but are, generally speaking, uneducated, and finally and most important, that they are influenced largely and in some cases almost wholly prejudice.

The essential criticisms, however, they may be states finally resolve themselves down to those that the ordinary jury is uneducated and prejudiced. In the first place it is not sufficient to prove that all this is, or might be so.

Continued on next page.

Con

HAL W. GREER—*Continued*

cases, they are practically held under arrest during the trial, and not allowed to go to their homes or otherwise pursue their normal habits. Imagine a conscientious, honest man thus held under surveillance in durance vile! Imagine the trial judge so held.

Eighth. The defendant's attorneys will make statements and arguments (?) appealing to the passions and prejudices of the jurors to directly violate their oaths and acquit the defendant, which they would not dare to make to the trial judge, E.g., Mr. Clarence Darrow's speech in defence of Haywood: "To hell with the Constitution and statute law," etc., as standing in the way of the laboring man's supposed rights. No doubt his speech was widely read by members of labor organizations, and created in their minds the belief that such organizations were justified in committing murder or any other crime to protect and foster their unions.

Ninth. As the law applied to crime is an exact science intended to prevent crime by fairly, justly and reasonably punishing those guilty of its infraction, there can be no reason for a jury on the theory that they will be more merciful than judges learned in the law and capable of deliberately and judiciously analyzing, weighing and applying all the facts.

Knowing they will be tried, not under the law and facts, but upon the emotions and sympathies of the jury, which the law itself would not permit, murderers and perpetrators of other crimes are encouraged and the spirit of anarchy is inculcated. Imagine those guilty of violence, intimidation, and destruction of property during "strikes," being tried according to the letter and the spirit of the law.

Tenth. But the strongest reason against the system lies in the fact that instead of every offence being accurately defined and punished, juries are continually adding to the definitions and destroying the certainty of punishment. The eloquent attorney who proclaims that "there is a higher law" is but inviting the jury to do something which the judge rarely ever does—violate their oaths of office. What a rich harvest of criticism Mr. Delmas reaped by attempting to read into the law a new excuse for crime with his "Dementia-Americana"! But he was frankly stating the reason for retaining the jury—to avoid punishment for a crime clearly proven under the exact definition of the law. If it were known to be a fact that every crime would be punished according to its definition, there can be no doubt of the salutary effect. It is the uncertainty of a jury verdict that breeds criminal desire and anarchy.—*Extracts, see 7, p. 288.*

Con

WILLIAM H. BLYMER,
Of the New York City Bar

TO the lawyer who loves logic, no game can be more interesting than a good jury trial. In addition to the consideration that he must give to the substantive law of the cause, he must consider the special laws and rules pertaining to the empaneling of a jury, the exceptions to be taken and the rules of evidence and there is no subject more interesting to the dialectician than the application of correct rules of evidence, as they are based wholly

Continued on next page.

Pro

CONNOR HALL—*Continued*

The question arises, what is to be substituted and where are we to find men of any kind perfectly trained for the specific problems, entirely well educated and unprejudiced? Much of the criticism of the jury as of other institutions, is based upon a fallacious comparison. The commentator sees certain evils in existing institutions and compares the result of these with that ideal result existing only in the mind of the philosopher. It is this strength of an opposition which lends a show of plausibility to criticisms which are often in fact wholly worthless.

We come then to the question, if the jury be abolished in civil trials, what is to take its place? Manifestly a judge, or two or more judges, or mayhaps a Soviet commission, who are to pass not only upon the law, but upon the facts as well. Then the inquiry arises, may we more reasonably expect a just result to be obtained by a bench of one or more judges than from a jury? The superiority of the jury is so clear and decisive that it is no wonder it has survived. Training and education are relative terms. No man, be he judge, juror, traveler or scholar, is trained to all specific problems that daily arise in human controversies. He may have the widest technical knowledge, the greatest personal acquaintance and knowledge of men and affairs, the longest experience of life, and yet, the first day he enters a jury box he may have presented to him for decision some problem with which he is wholly unfamiliar. If this be the case with the most accomplished juror, how much more with the average, the moderately well trained and educated man? He will find his own knowledge and experience entirely insufficient, and will be driven to the practice already long established. of calling in as witnesses those who are particularly qualified in the problems. All that is required of him is that he shall have fair intelligence and an open mind to hear and consider what is laid before him; and of these two qualifications, the latter is, if possible, of more importance.

Loud complaint is heard that the city business man dodges jury service. Whether the jury would be improved by a larger representation of leading business men is doubtful. I have often found myself, and have seen others, striking off the jury list the town business man and choosing instead the farmer or the mechanic, and for no other reason that I could gather than that the latter were regarded as better qualified for the service because their minds were more open, while the town business man, impressed with his own knowledge and perhaps his own importance, was more likely to insist upon his own particular views. It is not unusual to find the business man who has read "Every Man His Own Lawyer," has consulted lawyers a great deal or knows the judge familiarly. From one or all these he may imagine he knows some law and have developed a great conceit of his own skill in the solution of controversies. When he does this he automatically passes into the class of ex-justices of the peace, ex-constables and other undesirable smatterers.

When we speak of prejudice we usually mean the other man's views. Prejudice is a bad name which we give to the dog before hanging him. Prejudice, of course. merely means pre-judged, more or less fixed ideas, which in our friends is spoken of as conservatism. A big

Continued on next page.

Con

WILLIAM H. BLYMER—*Continued*

upon reasons for the presentation of facts which the jury should consider, and the exclusion of those that should be kept from it. Like the system of pleadings when it became so refined that certain men devoted themselves wholly to it, and became known as "special pleaders," to say nothing of the condition into which it has again arrived, the distinctions of evidence have attained to such a high degree of art, that neither the intricacies of bridge or those of any other game can compare with them. Finally, in addition to all of the elements above stated, there is the opportunity of unlimited play upon the minds of the jurors. The jury system, therefore, has a fascination that will doubtless cause many able lawyers to advocate its retention through a real love of the art of trying jury cases. In our great cities, however, even lawyers are suffering so much from the complexity of the jury system that it is doubted if many would long hesitate to embrace the opportunity of ridding the practice of it.

To advocate the abolition of the jury, which means the increase of power in the hands of the court, at a time when the public is clamoring for the recall of judges and decisions, might be inopportune were there no safeguards to suggest from the practices of other countries. This was already a subject of great care in the Roman times through the recusatio, or exception to the judge upon some ground of feared partiality. Under the Continental systems of today, the litigant is protected by still more elaborate provisions to facilitate the exercise of this right, as well as the setting aside of the judgment where prejudice can be shown and the recovery of damages from the judge for a malicious or fraudulent exercise of authority.

The highest court in France, the *Cour de Cassation* with three sections of sixteen members each, is a standing tribunal for the consideration of such complaints; the first section passing upon the charges; and the second trying them.

Further safeguards are found in the requirements that the grounds, or "motives," for each decision must be set forth, which is done through "Whereas" clauses, and that the decision must be rendered at the sitting at which the case is finally submitted, or at a sitting to which the court shall adjourn, if time for deliberation is required. This has as a consequence not only the establishment in writing of the reasons, but the accomplishment of that operation while the circumstances of the trial are fresh in the minds of all parties. The judicial function is thereby contained in narrow channels, and a result that may almost be termed scientific is produced. The process of reasoning is mapped out so that a departure from the facts as proven or a failure to give proper weight to evidence can readily be located, and the refusal to set forth the motives in the judgment is a denial of justice for which the judge is easily made to account. Aware of this fact, and knowing that every step in the construction of the decision must be consequent, the judge is forced to give great care to the logic that he employs as well as to state the facts precisely, and the unsuccessful litigant perceives either that grounds for his defeat existed, or that the case presents a questionable point of fact or law, and is seldom aggrieved toward the judiciary. He is not obliged to submit to a decision without

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Pro

CONNOR HALL—*Continued*

banker is conservative. A "hick" without a collar is prejudiced; though the truth is that each has had a narrow experience, their knowledge and experience lie in different fields, and one is about as good as the other if transferred.

When we consider the differing modes in which jurors and judges are selected certain advantages of the former as triers of fact are immediately obvious. A judge is elected or appointed for a definite time, longer or shorter for life or for years. He sits constantly trying case after case and is known as a man having power, before whom a given case will be brought. Jurors, on the other hand, are drawn from the body of the people for a single term of court; for a particular case a panel of only part of the whole number is drawn, and from these all partial or interested persons are excluded, and even afterward the parties have the right without question to strike off a certain additional number. They thus come to the case new, disinterested and unbiased.—*Extracts, see 8, p. 288.*

Pro

JESSE C. DUKE

Member, Virginia Bar

DETERMINED assaults upon the jury system were being made both in England and in the Colonies throughout the early history and at the time of the Revolution.

Even after the Revolution the failure to adequately protect jury trials in the proposed Constitution nearly caused its defeat, and it would never have been adopted except for the unofficial compromise which was reached to put such rights above question in the bill of rights amendments.

The jury is the last great check and balance which the people have upon Congress and the Federal Government. Unjust laws and unjust or political prosecutions can not be successful as long as they require 12 men to unanimously vote to approve them in a jury trial.

The fact that a jury trial is necessary is preventing thousands of cases of a spiteful or political nature from being started in the Federal courts over the prohibition law alone, in my opinion. Nor should a man be enabled to deprive a man of his right to sue for malicious prosecution or false arrest because a judge or commissioner alone has held that there was probable cause for a prosecution. Now, such cases must be tried by a jury and an informer or a framer-up knows that if the accused is held not guilty, the accused has a right of action for the trouble, expense, and loss of reputation resulting to the accused. However, prohibition cases, inasmuch as they involve imprisonment, is one of the class of cases which can not have any tribunal substituted for a jury trial, as it has already been held that they are not within the class of petty offenses in the cases cited.

In conclusion, I ask what kind of an innocent man is one who prefers a trial by judge to a trial by jury? Can any innocent man be hurt by a jury trial, when 12 of his neighbors unanimously acquits him? It is certainly easier to raise a reasonable doubt in the mind of a jury than of a judge, if you are innocent. Would it not make it possible for a system of "fixing" to be arranged in many jurisdictions, where it is only necessary for one man,

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Con

WILLIAM H. BLYMER—*Continued*

an opinion, or to one that is wholly illogical, save for the recourse of an expensive appeal.

Under the American system, the law does not require that the opinion should be exhaustive; indeed, there may be nothing further than the decision "judgment for the plaintiff", or "judgment for the defendant"; and, if it appears to either party to be contrary to the facts or the law, and he makes a motion to reargue the case, the court need make only the further decision: "Motion denied"; or worse: "Motion denied with costs"; or, if the judge is addressed in person regarding it, to say: "I have decided your case; if you are not satisfied you can appeal," none of which ways increases respect for the law.—*Extracts, see 9, p. 288.*

Con

S. CHESTERFIELD OPPENHEIM

Member, Michigan State Bar

WAIVER of jury trial in criminal cases generally is a highly practical issue at the present time both from the standpoint of the public and of the accused. The belief is common that the element of delay is one of the primary causes of the general disrespect attaching to the courts of criminal jurisdiction. It is said that an overzealousness in shielding the citizen against oppression and injustice has resulted in shifting to the background expedients designed to simplify and give momentum to the disposition of criminal cases.

As one among various methods of correcting these conditions, the adoption and use of an optional nonjury trial in all criminal prosecutions will contribute to a more effective administration of the criminal law. Such a plan will make criminal procedure more adaptable to the prompt dispatch of business and for that reason will aid in relieving the distressing congestion in the criminal dockets. It was this aspect of the problem that led the Connecticut court of errors in a very recent decision interpreting the statute of that State authorizing an elective nonjury trial in all criminal cases to say, "Speedy determination of criminal causes is almost as essential as their right determination."

From the standpoint of the accused, the power to elect a trial without jury is far from being a matter of mere speculative interest. There are situations in which a compulsory jury trial might be positively detrimental to the defendant. Suffice it to say at this point that in some cases the accused may justly feel that the chances of a fair, objective result at the hands of a jury are no more favorable than in the ancient proof by battle or ordeal.

Another consideration which is especially important in relation to the construction of our constitutional jury trial provisions deserves to be mentioned. Researches in legal history have thrown grave doubt upon, if not dispelled, the traditional idea that a trail by jury in criminal prosecutions was intended as an exclusive mode of determining the fate of the accused. In fact, the authorities establish that in theory at least, jury trial in England was volitional in origin. In practice, however, the accused plead and put himself upon the country *nolens volens*. The reason for this is not far to seek. In the transition from the older modes of proof to trial by jury, many instances occurred in which a recalcitrant accused stood mute when asked how he would be tried.

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Does the Jury System Impede Progress of Court Procedure?

Pro

RUSSELL DUANE
Member, Philadelphia Bar

THE jury system is wasteful of time, money, and human energy. The cost to the State of maintaining the civil courts for a single day often exceeds the entire amount of the verdicts rendered. On one occasion, when reading the morning paper, the writer glanced over the verdicts rendered the day before in the local courts. They were eleven in number and in the aggregate came to less than $5,000. This meagre result required the services of ten judges, at least thirty tipstaves and court stenographers, 132 jurymen on duty, 368 jurymen present and not needed, and at least 22 lawyers. The witnesses subpœnaed for the 150 cases on the list that day possibly exceeded six hundred. In other words, in order to accomplish this petty result, about eleven hundred persons lost the whole or a large portion of a day. Three or four judges could have decided these eleven cases, with equal or better results, and without loss of time to anyone except court officers and the counsel and witnesses directly concerned.

It is not difficult, therefore, to understand why important men whose time is worth something invariably beg off from jury service. To condemn such a man to spend a whole month in so futile a manner is a waste not only of his time, but his energy and brains. A business magnate can't afford to abandon transactions which may involve millions to help a group of incompetent men peddle out an imperfect form of justice in a series of petty disputes. In many instances he could better afford to pay the claims.

On the other hand, the shortness of the term of jury service, which is rarely more than a month, involves a waste to the community, in that by the time raw and inexperienced juries have had a chance to become educated somewhat in the character of their duties and to acquire a little practical sense, their term of service has expired. The waste of time incurred by litigants and witnesses is further augmented by constantly recurring delays and continuances in the trial of cases, and by repeated setting aside of unjust verdicts and resulting retrials with a repetition of the previous waste of time and with constantly increasing expense. An intelligent defendant, even though he has the best kind of defense, can well afford to pay a substantial sum in settlement of a case as an insurance against the uncertain vagaries of an average jury. It is easy to understand why, in England, voluntary commercial and trade tribunals composed of men of standing in their respective industries, have so largely supplanted courts and juries in the determination of manufacturing and commercial disputes. These litigants demand a tribunal possessing some qualifications for the difficult task imposed upon it.

It is another grave defect of the jury system that it involves the administration of justice by a "double-headed' tribunal. In a trial the judge decides questions of law and the jury questions of fact. In many cases the really essential facts are not disputed and it then

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Con

JUDGE MARCUS A. KAVANAGH
Judge, Superior Court, Cook County, Illinois

ONE can not expect a brick mason or banker to come into the jury box and there without a mistake transact matters entirely foreign to his daily habit, especially when clever men well used to the trade exert their best ability to mislead him.

Last year, in view of this situation, I adopted an expedient. On the first morning the jurors were to serve and before any case was called, all the members of the panel were called forward and seated within the bar. Then for an hour and a half or two hours, without reference to any particular case, after a warning that what was to be told them was not binding, but only advisory, and was to be disregarded in any trial where instructions to the contrary were given, I talked about their function and its responsibility to the state and to the accused. I repeated the stock instructions, which they probably would receive, and, explaining their purpose, illustrated them by examples. In a general way the practice and procedure of the court was made clear, as well as the use of the different rules of evidence.

Most lawyers and judges contend that my action in this regard was without any authority of law and irregular. There are two sides to that question. If there is no law for it, there is no law against it. At any rate the result was that from September 1, 1925, till September 1, 1926, out of nearly one hundred verdicts, the juries in my court room rendered only three which I myself would not have given. Concerning one of those three, I question more and more my own judgment as time goes on.

Last winter I tried another experiment with a jury. Its success astounded every one who knew of it. An American flag on its staff hangs over the bench in my court room. I keep it there because sometimes when one is tired and discouraged, to turn and look at its beauty and glory rests one's eyes and cheers one's heart. Well, a case was just finished before another judge in the same building. It took more than forty days to get a jury, and to get that jury had cost the taxpayers more than thirty-five thousand dollars. Just eight hundred eighty-seven citizens, men generally regarded as responsible, had gone into that jury box, of whom eight hundred thirty-five had disqualified themselves by their answers. It would not be unfair to estimate that seven hundred seventy-five of these committed perjury to escape a high patriotic service. In another case before another judge nearly five hundred citizens had a short time before disqualified themselves in the same way.

A criminal case which had attracted national attention appeared on my call for the coming Monday morning. The court attaches prophesied that a jury could not be chosen in less than three weeks. The Friday afternoon before the case was to be called, I summoned all the jurors from all the other court rooms into my own and informed them that this trial would commence Monday and that any twelve of them might be selected to hear the case. I told them from the bench that the twelve

Continued on next page

Pro

RUSSELL DUANE—*Continued*

becomes the duty of the judge to apply the law and decide the case, while the jury, occupying the humiliating position of idle and useless listeners, have no function whatever. In a still larger class of cases much time is wasted in endless wrangles between counsel, or between counsel and the judge, as to whether there is enough evidence to justify him in permitting the jury to render any verdict. Appellate tribunals are constantly called upon to expend their time in deciding whether trial judges took too much upon themselves by usurping the functions of the jury.

In cases where the trial judge decides to submit the evidence, lengthy "charges" are often made and answers given to verbose, meticulous, and complicated "points" submitted by counsel for the court's approval or disapproval, many of which would confuse even a trained legal mind. How, then, can a group of minds utterly untrained in that kind of thought and in the subject matter have the faintest comprehension of these fine distinctions? Such facts illustrate the impossible situation brought about through attempting to settle complicated cases by the concurrent action of two tribunals. It would seem to be only common sense to entrust the decision of civil cases to a single tribunal intelligent enough to understand its functions without being told.

The jury system not only fails to administer exact justice, but in our day it has had a most injurious effect upon the American bar. In our large cities ordinary jury cases are no longer tried, as in early days, by lawyers of prominence. Leaders of the bar, like leaders in industry, can't and won't waste their time in futile efforts to educate successive groups of incompetent jurors, by kindergarten methods, in unfamiliar subjects. They know the colossal waste of time, the futility of the entire thing, the consumption of whole days or weeks in going through an idle form of which the outcome is quite likely to be a triumph of ignorance and prejudice over reason and logic. In our large cities accident cases now exceed all others in number. Many of them are in the hands of commercially minded attorneys who employ agents and "runners" to chase ambulances, to solicit business in hospitals, to hire witnesses to establish imaginary facts, and to bribe physicians with fees dependent upon the extent to which redress for the resulting injury cannot be had while the jury system remains in existence, inasmuch as it is the jury and not the court which must ultimately decide all issues of fact.

The legislatures of many states have sought to afford a means of escape from the evils of the jury system by enacting laws providing in many instances for the substitution of auditors, masters, and referees, either by court action or by agreement of the parties. Fair-minded litigants who really want justice often resort voluntarily to such tribunals; but a litigant who is dubious about his case, or who wants "all the traffic will bear," is apt to insist on the "inalienable right of freemen," to invoke the prejudices of a jury.

It once fell to the lot of the writer to be counsel in three cases between the same parties, involving that most difficult of all questions—whether certain machinery was up to standard and suitable for the purpose intended. If tried before three separate juries, with endless wrangles over the propriety of questions and the admissibility of

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Con

JUDGE MARCUS A. KAVANAGH—*Continued*

selected would be kept living in a hotel away from their business and their families for maybe weeks. I called their attention to the fact that in order to escape a little service eight hundred thirty-five men in one court room and four hundred sixty in another, had disqualified themselves by their answers and pointed out how they might do the like if they wished. I even suggested the particular kind of answer to the lawyer's questions which would disqualify them.

Then I added: "However, gentlemen, before you give these replies, I wish to remind you that a few years ago seventy-seven thousand young men with families and friends who loved them, and affairs which needed them, took up the flag you see bending above us and at the call of their state and country carried it across the dangerous seas; laughing, they bore it through whirlwinds of shot and shell up to the blazing mouth of the cannon. They dyed its folds a deeper crimson with their young heart's blood and with their expiring souls lent a new and tender splendor to the eternal glory of its stars. They will never come back. They answered their country's call, and for reward they sleep under little white crosses in foreign graves. At the time they went away, the public prints told of two young men who went out into the park and to escape that service each shot off one of his fingers.

"Now, gentlemen, you can come into court Monday morning and mutilate your souls, just as those two contemptible cowards mutilated their bodies. No one will know it, it will lie with you, your country and your God. But if you are worthy of your citizenship and of the memory of its martyrs, you will gather under the shadow of that flag Monday morning and do your duty."

Strange as it may seem that homely little talk awoke the sleeping giant. An unheard-of miracle followed. Monday morning these jurors came thronging into my court room, nearly every one of them carrying a little package or valise containing his comb, brush, shaving utensils and night clothes, determined to see the case out. It did not take three weeks to get a jury. It took just one hour and a half. Not a man sidestepped. The giant in every bosom started to his feet and answered every question like a man. It took three days to try that case, instead of a month. We must not despair of our country. The giant in our soul is not dead, he is only sleeping and not so heavily at that. Even now he tosses in uneasy dreams.

It should be the function of the judge to guard the jury against improper influence and to let the law shine clearly into the darkest corners. Then, too, he should be permitted to drag out the facts which have been left obscured or misunderstood. If he suspects that a lie is worming its way into the verdict, he should extract and expose it. In other words, the judge should not be automaton, merely nodding yes or no in the trial, but an actual force concerned not that one side or the other may win but that truth shall prevail; a person of impartial power, adding his experience of fact to the experience of the jurors and joining his skill to that of counsel in bringing out the naked truth.

This was the office of a judge at common law; it is his function in the federal courts and in a few states where, until lately, the administration of justice shone brightly. We shall make no greater step toward an ideal adminis-

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The 71st Congress

Duration of the 70th Congress, March 4, 1929-March 4, 1931

First, or "Special" Session, Convened April 15, 1929.

Second, or "Long" Session, Begins December 2, 1929.

In the Senate
Membership
Total—96

55 Republicans 39 Democrats
1 Farmer-Labor
1 Vacancy

Presiding Officer
President: Charles Curtis, R.
Vice-President of the United States

Floor Leaders

Majority Leader	*Minority Leader*
James E. Watson, Ind., R.	Joseph T. Robinson, Ark., D.

In the House
Membership
Total—435

267 Republicans 163 Democrats
1 Farmer-Labor
4 Vacancies

Presiding Officer
Speaker: Nicholas Longworth, R.
Member of the House from Ohio

Floor Leaders

Majority Leader	*Minority Leader*
John Q. Tilson, Conn., R.	John N. Garner, Tex., D.

The Coming Month in Congress

by Norborne T. N. Robinson

GOING into November, the final month of the First Session of the Seventy-first Congress, which, if not ended before, will automatically come to a close at noon on December 2, when the regular "long" session begins, Senate leaders admit that it will be practically impossible to bring the tariff bill to final passage before December.

Optimistic Senators express the hope that the bill may be passed by the Senate and sent to the House before the end of November, but even the most sanguine of them is unwilling to predict that the conference committee, to which it will promptly be referred after the House disagrees to the Senate amendments, can or will report it back before December.

When President Hoover, on March 7, called Congress to meet in extraordinary session on April 15, it was for the purpose of enacting legislation for the benefit of the farm interests. The first step was the passage of the Farm Relief Bill which provided for the appointment of the Federal Farm Board. The second step was the revision of the tariff schedules affecting the farm interests.

Representatives of the agricultural sections asked that tariff revision be limited to those schedules which affected the farmers, but pressure was brought to bear on Congress by manufacturing and other interests affected by the tariff, with the result that revision was undertaken "all along the line."

Inevitably a long-drawn-out struggle in the Senate ensued. Party lines were broken and a coalition of Republican and Democratic Senators was made which formed a majority of the Senate. The result was that the Republican Senators in charge of the bill were defeated in their attempt to put through a definite revision program. One of the features of this contest was the ability of the coalition to add to the tariff bill the debenture feature of the farm relief bill which had been defeated.

The House is not expected to accept the bill as amended by the Senate, which means that the bill will be sent to conference. It is felt that if the conferees can reach an agreement it will only be after meetings lasting several weeks, running well into December.

Since the current extra session and the coming regular session are both sessions of the Seventy-first Congress, the status of the tariff bill will be unchanged by the ending of the former and the beginning of the latter. The bill will remain before Congress until it is finally disposed of.

The House will end its period of three-day adjournments on November 11. It is expected that at that time it will appoint a few committees, particularly the appropriations committee. These committees will begin work preparing bills for the regular session. The House leaders want the appropriations committee to have two or three of the supply bills ready for the opening of the regular session so they can be passed before Christmas. In the meantime, until the extra session ends, the House will mark time until the Senate finishes with the tariff bill.

Action Taken by Congress

A Daily Summary of the Proceedings of the House and Senate

September 27 to October 21, 1929

Note—This department contains a record of action on the floor of the House and the Senate. By following it from month to month the reader obtains a compact but complete review of the work actually done by Congress throughout the session. The principal abbreviations used are the following: H. R. means House bill; H. Res. means House Resolution; H. J. Res. means House Joint Resolution; H. Con. Res. means House Concurrent Resolution; S. means Senate Bill; S. Res., Senate Resolution; S. J. Res., Senate Joint Resolution, and S. Con. Res., Senate Concurrent Resolution. If reference is made to the consideration or action by the Senate of a House bill or resolution, it means that the House has passed it and sent it to the Senate, and vice versa.

Friday, September 27, 1929

Senate:

Resumed considertion of H. R. 2667, the tariff bill.

Messrs. Robinson, Ark., D., Fess, Ohio, R., Norris, Nebr., R., King, Utah, D., Connally, Tex., D., Bratton, N. Mex., D., La Follette, Wisc., R., Sackett, Ky., R., and others spoke on the bill.

Agreed to S. Res. 123, relating to the incorrect cotton reports.

Adjourned until Monday, September 30, 1929.

House:

The House was not in session.

Monday, September 30, 1929

Senate:

Debated S. Res. 119, on Federal legislation of interstate air transportation.

Mr. Blaine, Wisc., R., spoke on Federal injunction in labor disputes.

Resumed consideration of H. R. 2667, the tariff bill.

Messrs. Robinson, Ind., R., Hawes, Mo., D., and others spoke on the bill.

Held an open executive session.

Recessed.

House:

Rev. James Shera Montgomery, D. D., offered prayer.

Read the Journal.

Adjourned until Thursday, October 3, 1929.

Tuesday, October 1, 1929

Senate:

Mr. Wagner, N. Y., D., spoke on the flexible provisions of the pending tariff bill, H. R. 2667.

Messrs. Reed, Pa., R., Barkley, Ky., D., Walsh, Mass., D., Blaine, Wisc., R., Heflin, Ala., D., and others spoke on H. R. 2667, the tariff bill.

Agreed to S. Res. 20, providing for an investigation of lobbying organizations.

Recessed.

House:

The House was not in session.

Wednesday, October 2, 1929

Senate:

Mr. Overman, N. C., D., spoke on the labor conditions in North Carolina.

Resumed consideration of H. R. 2667, the tariff bill.

Messrs. Johnson, Calif., R., Swanson, Va., D., Goff, W. Va., R., and others spoke on the bill.

Adopted by a vote of 47 to 42 (not voting, 6), an amendment by Mr. Simmons, N. C., D., to H. R. 2667, the tariff bill, requiring legislative action to make effective recommendations of the Tariff Commission, thereby striking from the Smoot-Hawley measure the President's power to raise and lower duties.

Executive session.

Recessed.

House:

The House was not in session.

Thursday, October 3, 1929

Senate:

Resumed consideration of H. R. 2667, the tariff bill.

Messrs. Smoot, Utah, R., Reed, Pa., R., Black, Ala., D., Harrison, Miss., D., Simmons, N. C., D., Norris, Nebr., R., and others spoke on the bill.

Without a record vote, accepted the Finance Committee majority amendment directing the Tariff Commission to convert existing an valorem import duties to equivalent percentages on the basis of the "domestic value" plan.

Recessed.

House:

The Clerk of the House, William Tyler Page read a letter from the Speaker, Mr. Longworth, designating, Mr. Arentz, Nev., R., as Speaker pro tem.

Adjourned until Monday, October 7, 1929.

Friday, October 4, 1929

Senate:

Mr. Dill, Wash., D., spoke on Premier MacDonald's visit to the United States.

Recessed for five minutes for the reception of Sergt. Alvin C. York.

Mr. King, Utah, D., announced the death of Dr. Gustav Stresemann.

Debated the muscle shoals problem.

Resumed consideration of H. R. 2667, the tariff bill.

Messrs. Blease, S. C., D., Smith, S. C., D., Heflin, Ala., D., Wheeler, Mont., D., Simmons, N. C., D., Norris, Nebr., R., King, Utah, D., and others spoke on the bill.

Restored to the Smoot-Hawley tariff the bipartisan character of the Tariff Commission which has been removed by the House which had increased the number of Commissions from six to seven.

Recessed.

Saturday, October 5, 1929

Senate:

Resumed consideration of H. R. 2667, the tariff bill.

Messrs. Smoot, Utah, R., King, Utah, D., and others spoke on the bill.

Agreed to S. Res. 128, for an investigation by the Secretary of Commerce into the investments of American capital abroad.

Recessed until Monday, October 7, 1929.

House:

The House was not in session.

Monday, October 7, 1929

Senate:

Resumed consideration of H. R. 2667, the tariff bill.

Messrs. Harrison, Miss., D., Reed, Pa., R., King, Utah, D., Swanson, Va., D., and others spoke on the bill.

Recessed to receive the Prime Minister of Great Britain, J. Ramsay MacDonald.

Messrs. Smoot, Utah, R., Simmons, N. C., D., Reed, Pa., R., Walsh, Mass., D., and others spoke on the tariff bill.

Agreed by a vote of 44 to 37 (not voting, 14), to restore to the tariff bill, H. R. 2667, the existing law defining United States value as it is employed in the levying of import duties.

Recessed.

House:

Majority Leader Tilson appointed Representatives Porter, Pa., R., and Linthicum, Md., D., to escort the British prime minister and the British ambassador into the House to receive members upon adjournment.

Adjourned until Thursday, October 10, 1929.

Premier MacDonald officially addressed the House.

Tuesday, October 8, 1929

Senate:

Resumed consideration of H. R. 2667, the tariff bill.

Messrs. Smoot, Utah, R., George, Ga., D., Reed, Pa., R., McMaster, S. D., R., Harrison, Miss., D., Vandenburg, Mich., R., Tydings, Md., D., and others spoke on the bill.

Rejection by a vote of 44 to 41 (not voting, 10), the Finance Committee's amendment to the tariff bill, proposing to give manufacturers, wholesalers and labor organizations the right to intervene in Customs Court cases involving appeals for reappraisement and protests against collector's decisions.

Mr. Oddie, Nev., R., spoke on the proposed inter-American highway and the Second Pan American Highway Congress, Rio De Janeiro, Brazil, August, 1929.

Recessed.

House:

The House was not in session.

Wednesday, October 9, 1929

Senate:

Resumed consideration of H. R. 2667, the tariff bill.

Messrs. Bingham, Conn., R., Broussard, La., D., King, Utah, D., Norris, Nebr., R. Simmons, N. C., D., Robinson, Ark., D., and others spoke on the bill.

Rejected by a vote of 45 to 35 (not voting, 14), an amendment to the tariff bill, proposing to give independence to the Philippine Islands as soon as a constitution should be ratified and promulgated.

Recessed.

The House was not in session.

Thursday, October 10, 1929

Senate:

Resumed consideration of H. R. 2667, the tariff bill.

Messrs. Barkley, Ky., D., Walsh, Mont., D., King, Utah, D., Vandenburg, Mich., R., Broussard, La., D., Wheeler, Mont., D., and others spoke on the bill.

Rejected by a vote of 63 to 19 (not voting, 13), an amendment to the tariff bill favoring Philippine independence.

Agreed to, by a vote of 42 to 19, (not voting, 16), an amendment to the tariff bill, giving the American manufacturer the right to protest against the valuation or classification of all imported merchandise.

Executive session.

Recessed.

House:

Majority Leader Tilson acted as speaker pro tem.

Invocation delivered and Journal read.

Adjourned until Monday, October 14, 1929.

Friday, October 11, 1929

Senate:

Agreed to S. Res. 127, for an investigation of the Government of the District of Columbia.

Resumed consideration of H. R. 2667, the tariff bill.

Messrs. Cutting, N. Mex., R., Wheeler, Mont., D., Tydings, Md., D., Smoot, Utah, R., Black, Ala., D., and others spoke on the bill.

Agreed by a vote of 38 to 36 (not voting, 21), to an amendment to the tariff bill, to permit the entry into the United States of all literature except that "urging forcible resistance to any laws of the United States, or containing any threat to take the life, or inflict bodily harm to any person in the United States."

Recessed until Monday, October 14, 1929.

House:

The House was not in session.

Monday, October 14, 1929

Senate:

Resumed consideration of H. R. 2667, the tariff bill.

Messrs. Blaine, Wis., R., Bingham, Conn., R., Brookhart, Iowa, R., Walsh, Mont., D., Frazier, N. D., R., and others spoke on the bill.

Rejected by a vote of 39 to 25 (not voting, 31), an amendment to the tariff bill, requiring payment of duty on flour manufactured from imported wheat.

Recessed.

House:

Agreed to resolution providing for the continuance of twice-a-week meetings of the House, without the transaction of business.

Adopted resolutions commemorative of the death of several members of the House.

Adjourned until Thursday, October 17, 1929.

Tuesday, October 15, 1929

Senate:

Resumed consideration of H. R. 2667, the tariff bill.

Messrs. Fletcher, Fla., D., Bingham, Conn., R., Swanson, Va., D., Shortridge, Calif., R, George, Ga., D., McMaster, S. D., R., and others spoke on the bill.

Adopted without a record vote an amendment to H. R. 2667, requiring the President to name a new Tariff Commission within three months of the enactment of the bill.

Adopted by a vote of 47 to 29 (not voting, 19), to an amendment to the tariff bill directing the Commission in the future to supply members of Congress with all information collected relating to manufacturing costs in the United States.

Mr. Harris, Ga., D., announced the death of Hon. Leslie Jasper Steele, a Representative from Georgia.

Recessed out of respect for Representative Steele.

House:

The House was not in session.

Wednesday, October 16, 1929

Senate:

Held open executive session for the consideration of the Farm Board nominations.

Messrs. Blease, S. C., D., Robinson, Ark., D., McNary, Ore., R., Norris, Nebr., R., Copeland, N. Y., D., Smith, S. C., D., Heflin, Ala., D., and others spoke on the subject.

All nominations were confirmed a record vote being required on only three. The chairman of the Board, Alexander Legge, was confirmed by a vote of 67 to 13. Samuel R. McKelvie, appointed for a two-year term, was approved by a vote of 50 to 27. Carl Williams named for a six-year term, was confirmed by a vote of 57 to 20.

Recessed.

House:

The House was not in session.

Thursday, October 17, 1929

Senate:

Resumed consideration of H. R. 2667, the tariff bill.

Messrs. Fletcher, Fla., D., George, Ga., D., King, Utah, D., Borah, Idaho, R., Hastings, Okla., D., Walsh, Mass., D., Swanson, Va., D., and others spoke on the bill.

Agreed, by a vote of 68 to 11 (not voting 16), to an amendment to the tariff bill, H. R. 2667, creating a "consumers counsel" of the Tariff Commission.

Recessed.

House:

Met and adjourned, without action, until Monday, October 21, 1929.

Friday, October 18, 1929

Senate:

Resumed consideration of H. R. 2667, the tariff bill.

Messrs. Kig, Utah, D., Walsh, Mont., D., Norris, Nebr., R., Copeland, N. Y., D., Nye, N. D., R., Smoot, Utah, D., Walsh, Mass., D., Waterman, Colo., R., and others spoke on the bill.

Rejected by a vote of 60 to 14 (not voting, 21), an amendment to the tariff bill relating to the passage of this bill and the Cuban reciprocity treaty.

Recessed.

House:

The House was not in session.

Saturday, October 19, 1929

Senate:

Resumed consideration of H. R. 2667, the tariff bill.

Messrs. Norris, Nebr., R., George, Ga., D., Connally, Tex., D., Brookhart, Iowa, R., Thomas, Idaho, R., Barkley, Ky., D., Borah, Idaho, R., Hetlin, Ala., D., and others spoke on the bill.

Agreed by a vote of 42 to 34 (not voting, 19), to attach the export debenture plan of farm relief to the tariff bill., R. R. 2667.

Recessed until Monday, October 21, 1929.

House:

The House was not in session.

Monday, October 21, 1929

Senate:

Agreed to a resolution requesting the Federal Trade Commission to make an immediate and thorough investigation of the alleged violation of the antitrust laws concerning the prices of cottonseed and cottonseed meal by corporations operating cottonseed-oil mills.

Resumed consideration of H. R. 2667, the tariff bill.

Messrs. Hawes, Mo., D., Robinson, Ark., D., Blease, S. C., D., Steiwer, Ore., R., Black, Ala., D., Howell, Nebr., R., and others spoke on the bill.

Recessed.

House:

Adjourned without action, until Thursday, October 24, 1929.

EXECUTIVE DEPARTMENT

The White House Calendar

September 27 to October 21

Executive Orders

October 1—An executive order transferring the Division of Cooperative Marketing, Bureau of Agricultural Economics, Department of Agriculture, to the Federal Farm Board.

October 2—An executive order excluding four tracts of land from the Tongasa National Forest, Alaska, heretofore occupied as a homesite or for fish cannery purposes, and restoring them to entry.

October 11—An executive order creating a port of entry in Customs Collection District No. 30 (Washington) with headquarters at Seattle.

October 19—An executive order setting apart for National defense purposes the airspace over Aberdeen Proving Ground, portions of the Fort Hoyle and the Edgewood Arsenal Military Reservations and portions of Bush River, Gunpowder River and Chesapeake Bay.

Proclamations

September 28—A proclamation extending to citizens of the Irish Free State the provisions of the Copyright Laws of the United States.

October 11—A proclamation modifying the boundaries of the Nantahela National Forest, Ga., N. C., and S. C.

October 11—A proclamation of the Convention further extending the duration of the Mexican Claims Commission.

Important Civilian Appointments

September 27—George A. Parks, of Colorado, to be Governor of Alaska.

October 2—Peter Michael Larson, of Minnesota, to be register of the land office at Cass Lake, Minnesota.

October 3—Louis Edward Graham, of Pennsylyania, to be United States Attorney, western district of Pennsylvania.

October 11—Irwin B. Laughlin, of Pennsylvania, to be United States Ambassador to Spain.

October 11—Dr. Frederick W. Kratz to be assistant surgeon in the Health Department.

October 17—Thomas S. Williams, of Illinois, to be judge of the Court of Claims.

October 17—Benjamin H. Littleton, of Tennessee, to be a judge of the Court of Claims.

October 17—Richard J. Hopkins, of Kansas, to be United States Judge, district of Kansas.

October 17—Raymond C. Brown, of Hawaii, to be secretary of the Territory of Hawaii.

October 17—Landreth M. Harrison, of Minnesota, to be a secretary in the Diplomatic Service of the United States of America.

October 21—Eugene Black, of Texas, to be a member of the United States Board of Tax Appeals.

October 21—James N. Tittemore, of Wisconsin, to be United States Marshal, eastern district of Wisconsin.

The National Commission on Law Observance and Enforcement

ON May 20, 1929, the President announced the membership of his crime commission, which subsequently adopted the name "National Commission on Law Observance and Enforcement." Members of the commission are to serve without compensation, but a fund of $250,000 previously authorized by Congress, was made available for the expenses of their work. The eleven members of the commission are:

George W. Wickersham, Chairman, former Attorney General.

Newton D. Baker, former Secretary of War.

Frank J. Loesch, lawyer, vice-president, Chicago Crime Commission.

Roscoe Pound, dean, Harvard Law School.

William I. Grubb, federal judge, Northern District of Alabama.

Monte M. Lehmann, lawyer, New Orleans.

William S. Kenyon, federal judge, Circuit Court of Appeals.

Kenneth R. Mackintosh, chief justice, Supreme Court of Washington.

Paul J. McCormick, federal judge, Southern District of California.

Henry W. Anderson, lawyer, Richmond.

Ada I. Comstock, president, Radcliffe College.

Secretary: Max Lowenthal, lawyer, New York City.

JUDICIAL DEPARTMENT

The Month in the Supreme Court

June 3 to October 14

The Supreme Court of the United States, which adjourned on June 3, 1929, for the Summer, reconvened on October 7 for the autumn term. On October 7, the Court met and Chief Justice Taft announced that after the transaction of routine business the Court would adjourn until October 14.

On October 14, the Court handed down written opinions in four cases, denied 66 petitions for writs of certiorari and granted 14.

The Case—No. 578. The Macallen Company, Appellant, v. the Commonwealth of Massachusetts. On appeal from the Supreme Judicial Court of Massachusetts.

The Decision—Petition for rehearing denied on October 14, 1929. The Supreme Court held, in the original Decision of May 27, 1929, that a State cannot tax the income of a corporation derived from non-taxable securities.

The Opinion—Mr. Justice Sutherland delivered the opinion of the Court on May 27, which, in part, follows:

A statute of Massachusetts, G. L. c. 63, sec. 32, as amended by St. 1923, c. 424, sec. 1, provides:

Except as otherwise provided in sections thirty-four and thirty-four A, every domestic business corporation shall pay annually, with respect to the carrying on or doing of business by it, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one twentieth of 1 per cent of the fair cash value of all the shares constituting its capital stock on the first day of April when the return called for by section thirty-five is due:

(1) An amount equal to five dollars per thousand upon the value of its corporate excess.

(2) An amount equal to two and one-half per cent of that part of its net income, as defined in this chapter, which is derived from business carried on within the commonwealth.

By G. L. c. 63, sec. 30, par. 5, as amended by St. 1925, c. 343, sec. 1A, "net income" is defined—

"'Net income,' except as otherwise provided in sections thirty-four and thirty-nine, the net income for the taxable year as required to be returned by the corporation to the Federal Government under the Federal revenue act applicable for the period, adding thereto any net losses as defined in said Federal revenue act that have been deducted, and all interest and dividends not so required to be returned as net income except dividends not so required to be returned as net income except dividends on shares of stock of corporations organized under the laws of the commonwealth and dividends in liquidation paid from capital."

Before this amendment, the definition embodied in G. L. c. 63, sec. 30, par 5, as amended, shortly before the passage of the last quoted amendment, by Stat. 1925, c. 265, sec. 1, provided:

"'Net income,' except as otherwise provided in sections 34 and 39, the net income for the taxable year as required to be returned by the corporation to the Federal Government under the Federal revenue act applicable to the period, adding thereto any net losses as defined by said Federal revenue act that have been deducted, and, in the case of a domestic business corporation, such interest and dividends, not so required to be returned as net income, as would be taxable if received by an inhabitant of this commonwealth; less, both in the case of a domestic business corporation and of a foreign corporation, interest, so required to be returned, which is received upon bonds, notes and certificates of indebtedness of the United States."

Thus, under the original definition of net income, there was expressly excluded from the two and one-half per cent of taxable net income all interest received upon bonds, notes and certificates of indebtedness of the United States. And the definition had the effect of excluding, in the same respect, interest on State, county and municipal bonds.

Appellant, a business corporation organized under the laws of Massachusetts, owned a large number of United States Liberty bonds and Federal Farm Loan bonds. The Liberty bonds by statute of the United States are expressly made exempt from all taxation imposed by any State, except estate or inheritance taxes. Federal Farm Loan bonds are issued under authority of c. 245, 39 Stat. 360, and, by section 26, p. 380, declared to be instrumentalities of the United States and both as to principal and income exempt from all State taxation. The corporation also owned a large number of bonds of Massachusetts counties and municipalities which, when issued and acquired by the corporation, were exempt from taxation by the terms of a State Statute. G. L. c. 59, section 5, par. 25. Of course, in respect of United States securities, the

statutory exemption is superfluous. A State tax, however small, upon such securities or interest derived therefrom, interferes or tends to interfere with the constitutional power of the general government to borrow money on the credit of the United States, and constitutes a burden upon the operations of government, and carried far enough would prove destructive. The principle set forth a century ago in Weston v. Charleston, 2 Pet. 449, 468, has never since been departed from by this Court:

The taxing authorities of the State assessed against appellant, for the year 1926, a tax under the provisions of the then-existing statute as first above quoted, adding, for the purpose of computing the assessment, to the amount of the net income of appellant as determined by the Federal income tax returns of appellant, all sums of interest received by appellant from the foregoing United States, Farm Loan, and county and municipal bonds. Without this addition, and under the original definition of net income, the amount of the tax assessed would have been materially less.

Appellant paid the amount assessed under protest and brought a petition for abatement of the tax under the provisions of the State law, setting forth the foregoing facts and alleging the unconstitutionality, under the Federal Constitution, of the statute insofar as it was held to include interest derived from the tax-exempt securities: (1) as impairing the obligation of contracts; (2) as an attempt to impose a tax upon income derived from securities and instrumentalities of the United States; (3) as depriving petitioner of its property without due process of law and denying it the equal protection of the law in violation of the Fourteenth Amendment; (4) as an impairment and in derogation of the power of Congress to borrow money on the credit of the United States; and for other reasons not necessary for present purposes to be set forth.

A Justice of the Supreme Judicial Court sustained a demurrer to the petition. On appeal, this was affirmed by the full court, and the petition dismissed. That court, through its Chief Justice, delivered a carefully drawn opinion, reviewing numerous decisions of this Court bearing upon the question involved. The tax was held to be not a tax on income, but an excise "with respect to the carrying on or doing of business," as the statute itself in form declares. While it was plain that the tax was larger than it would have been if the income from the tax-exempt securities had not been added to the other items in making up the factor of "net income," the court held that the income was not taxed, but simply employed together with the other items in ascertaining the measure for computing the excise.

The words of the act and the opinion of the State court as to the nature of the tax are to be given consideration and weight; but they are not conclusive. As it many times has been decided neither State courts nor legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect. And this Court must determine for itself by independent inquiry whether the tax here is what, in form and by the decision of the State court, it is declared to be, namely, an excise tax on the privilege of doing business, or, under the guise of that designation, is in substance and reality a tax on the income derived from tax-exempt securities. If, by varying the form—that is to say, if, by using one name for a tax instead of another, or imposing a tax in terms upon one subject when another is in reality aimed at—the substance and effect of the impositions upon powers of taxation would come to naught. The rule is otherwise.

The court below predicates its decision upon a series of decisions of which Flint v. Stone Tracy Co., 220 U. S. 107, 163-165, is the extreme example, holding that a tax lawfully imposed upon the exercise of corporate privileges within the taxing power may be measured by income from the property of the corporation although a part of such income is derived from nontaxable property. The distinction pointed out in these cases is between an attempt to tax the property or income as such and to measure a legitimate tax upon the privileges involved in the use thereof. It is implicit in all that the thing taxed in form was in fact and reality the subject aimed at, and that any burden put upon the nontaxable subject by its use as a measure of value was fortuitous and incidental.

The aphorism of Chief Justice Marshall in McCulloch v. Maryland, 4 Wh. 316, 431, that "the power to tax involves the power to destroy," has frequently been reiterated by this Court. The principle, of course, is important only where the tax is sought to be imposed upon a nontaxable subject; or, as said in Knowton v. Moore, 178 U. S. 41, 60, " . . . the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope." Not only may the power to tax be exercised oppressively, but for one government—State or nation—to lay a tax upon the instrumentalities or securities of the other is derogatory to the latter's dignity, subversive of its powers, and repugnant to its paramount authority. See California v. Pacific Railroad Co., 127 U. S. 1, 41. These constitute special and compelling reasons why courts, in scrutinizing taxing acts like that here involved, should be acute to distinguish between an exaction which in substance and reality is what it pretends to be, and a scheme to lay a tax upon a nontaxable subject by a deceptive use of words. The fact that a tax ostensibly laid upon a taxable subject is to be measured by the value of a nontaxable subject at once suggests the probability that it was the latter rather than the former that the law-maker sought to reach. If inquiry discloses persuasive grounds for the conclusion that such is the real purpose and effect of the legislation, the tax cannot be upheld without subverting the well-established rule that " . . . what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result . . . constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation." Fairbank v. United States, 181, U. S. 283, 294, 300.

In the consideratoin of such legislation, the controlling principle, constantly to be borne in mind, is that the State cannot tax the instrumentalities or bonds of the United States, or, what is the same thing, the income derived therefrom, directly or indirectly—that is to say, it cannot tax them in any form. Words which, literally considered, import a tax upon something else—a tax, for example, as here, upon the privilege of doing business measured in part by the amount of nontaxable interest received—may, nevertheless, be adjudged to lay a tax upon the interest, if that purpose be fairly inferable from a consideration of the history, the surrounding circumstances, or the

statute itself considered in all its parts. See Home Savings Bank v. Des Moines, 205, U. S. 503, 510, 521.

On the one hand, the State is at liberty to tax a corporation with respect to the doing of its business. On the other hand, the State cannot tax the income of the corporation derived from nontaxable securities. It necessarily follows that the legislature may not, by an artful use of words, deprive this Court of its authority to look beyond the words to the real legislative purpose. And the power and the duty of the Court to do so is of great practical importance. For when the aim of the legislature is simply to tax the former, it is less likely to impose an injurious burden upon the latter than when the aim is directed primarily against the latter. See Galveston, Harrisburg &c. Ry. Co. v. Texas, supra, p. 227.

In the present case, it appears that the original statute exempted from consideration as a part of the measure of the tax all interest upon the nontaxable securities. The amended act now in force has the effect of repealing this original provision and imposing a burden upon the securities from which, by express language, they had theretofore been free. This was a distinct change of policy on the part of the Commonwealth, adopted, as though it had been so declared in precise words, for the very purpose of subjecting these securities pro tanto to the burden of the tax. This conclusion is confirmed, if that be necessary, by the report of the special commission appointed by the legislature to investigate the subject of taxation of banking institutions, Mass. 1925 House Documents, No. 233.

This report received the consideration of the legislature and, it is fair to suppose, constituted the basis for adopting the amendment here assailed. The effect of the report is that nontaxable bonds nevertheless should be subjected to the burden of the tax; and, since that could not be imposed directly, the clear intimation is that it be imposed indirectly through the medium of the so-called "excise."

It has been suggested that the object of the change was to conform the taxation of business corporations to that authorized by Congress for the taxation of national banks. Whether under recent Federal statutes, States are authorized to impose a tax upon the income from United States bonds held by national banks, we need not stop to inquire. Certainly there is no statute of the United States which undertakes to authorize a State to impose a tax upon such bonds held by other kinds of corporations. And what power Congress has under the Constitution in respect of such authorization we need not now determine. It is clear that authority, even if given, to impose a tax on Federal bonds in the case of national banks does not include, by implication or otherwise, the authority to impose a tax upon such bonds held by ordinary corporations.

It is also suggested in that connection that the amendment in question is necessary, and that its real object was, to avoid discrimination forbidden by Federal statutes against national banks. But it is enough to say that if such discrimination would otherwise result it must be avoided by some method which does not involve the imposition of a tax which uniformly for a century has been condemned by this Court as unconstitutional. The State may not save itself from an Act of Congress by violating the Constitution.

We conclude that the amended act in substance and effect imposes a tax upon Federal bonds and securities; and it necessarily follows that the act in substance and effect also imposes a tax upon the county and municipal bonds. In both respects, the act is void. As to the former, the act is in derogation of the constitutional power of Congress to borrow money on the credit of the United States as well as in violation of the Acts of Congress declaring such bonds and securities to be nontaxable; and as to the latter, the act impairs the obligation of the statutory contract of the State by which such bonds were made exempt from State taxation.

Judgment reversed.

May 27, 1929.

Is the Jury System As An American Institution Wholly Satisfactory?

Continued from page 274

Pro

HAROLD W. CORBIN—*Continued*

that the writers of the Magna Charta did not conceive of the jury of our day, that jurors were originally witnesses, that they were chosen, not for their complete disinterestedness, but, rather, for their familiarity with the matters in question. It is true that many of the champions of the jury have too often relied upon the sanctity of age. I hold no brief for the worship of outworn machinery. I do not rest upon tradition. I consider the jury, not as it was seven hundred years ago, but as it is today. We have fostered and improved upon the original conception of our ancestors centuries ago, until it has reached the form in which it now exists—an instrument for the decision of facts nowhere rivaled, in the field of the legal tribunal, for its impartiality, independence and satisfaction to the great body of our citizenry. Let us continue to improve it. Let us not sweep it away with the cry of "fetish" because it has served us so long. Age may have wisdom as well as years.—*Extracts, see 4, pg. 288.*

Con

JOSEPH G. SWEET—*Continued*

practically everyone in the community was capable of understanding them, and did understand them, the jury system was a fairly satisfactory means of disposing of litigation. Today conditions have entirely changed. Wide knowledge and accurate and controlled thinking are essential to the disposition of suits at law. It is plain that the jury system does not bring these to the administration of justice.

It is highly improbable that the jury system will, in our generation, ever be entirely abolished. Perhaps, with radical modifications, it should be retained, but, as it now stands, it is an apparent sourse of injustice, delay and appeal. It assumes that persons with no training in the self-restraint necessary for the discharge of judicial functions have it. It assumes that the unfit may perform the duties of the fit and, above all, it calls upon ignorance to sit in judgment upon learning. It is about as well fitted to the needs of modern society as a smooth bore musket to those of a modern marine.—*Extracts, see 5, pg. 288.*

Resolutions and bills for the Modification of the Jury System

Continued from page 270

able cause for believing that error has intervened in the proceedings.

Sec. 10. Each district court, in addition to the rules hereinbefore authorized, shall, from time to time, make rules governing the process, writs, pleadings, practice, procedure, costs, bail, undertakings, bonds, orders, sentences, judgments, and appeals in cases of which a commissioner's court has jurisdiction, in conformity, except as otherwise authorized or prescribed hereby, as nearly as may be with what the court determines to prevail generally within the district; the records to be kept by the commissioner's court; the conduct of its business; the place or places and the times at which it shall be held; the allocation of cases to the divisions of a district in which such divisions exist; and the efficient enforcement of the provisions of this Act. A commissioner's court may issue process or writs, or do anything authorized by the rules made hereunder, necessary or appropriate to the exercise of the jurisdiction and powers conferred, or to the performance of the duties imposed, upon it by this Act.

Sec. 11. The Supreme Court of the United States may, from time to time, revise or alter the rules hereunder made by any district court or may make rules applicable in all districts for the efficient enforcement of the provisions of this act.

Sec. 12. Adjudication of invalidity of any part of this Act shall not invalidate or affect any other of its provisions.

Are Jury Trials Fairer to the Accused Than Trials By Jury?

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Pro

JESSE C. DUKE—*Continued*

whether a commissioner or a judge, to be satisfied of the "innocence" of the accused, to have the case dismissed? If the cases are really petty and involve no moral delinquency, why not let them forfeit collateral for a small amount as is being done in the District of Columbia?—*Extracts, see 10, pg. 288.*

Con

S. CHESTERFIELD OPPENHEIM—*Continued*

In such cases, to impanel a jury in the face of the defendant's silence was too much of a strain upon the common-law conscience. It was not a *legale indicium parium* nor *secundum legem terrae.* But unless there was a trial by country, no convcition could be obtained, and without a legal conviction the accused could not suffer a forfeiture of property—a sad state of affairs for the Crown's pocket. Therefore, to satisfy the technical requirements of the law, consent was coerced by the revolting *peine forte et dure.—Extracts, see 11, pg. 288.*

Does the Jury System Impede Progress of Court Procedure?

Continued from page 280

Pro

RUSSELL DUANE—*Continued*

evidence, with tedious motions and arguments addressed to the court, and followed by vain efforts to explain to these juries what the cases were all about, they would have consumed at least two weeks of the court's time. The ultimate result would have meant nothing intelligent, because the questions at issue were too technical for a jury to understand. The course actually followed was to refer the three cases to a member of our bar who was also a distinguished engineer. Counsel agreed that the clumsy and meticulous rules of evidence enforced in jury trials had no place before an intelligent tribunal and that any evidence deemed germane by either side should be received. The cases were tried jointly and the entire proceeding consumed less than five hours of a single day.

Con

JUDGE MARCUS A. KAVANAGH—*Continued*

tration of justice than to give the power to conduct a trial to the judge who presides, and to place the responsibility of the trial on his shoulders.

Under the system which prevails in most of our state courts, the conduct of a criminal trial is transferred by force of statute from the hands of an experienced, impartial magistrate to the eager partisanship of the hired lawyers. It transforms the sworn judge into a mere ringside referee who must regard himself as without care whether the wrong or the right party wins, so long as the champions fight according to the rules of the roped arena.

This system does not concern itself so much with whether the victory shall rest with the just cause, but rather that success shall fall to the smarter lawyer.

Sources from which Material in this Number is Taken

Articles for which no source is given have been specially prepared for this number of THE CONGRESSIONAL DIGEST.

1. "History of Trial by Jury," Wm. Forsyth, M. A.
2. Harvard Law Review, Vol. XXXIX, No. 8.
3. Hearings, House Com. on Judiciary, January 17, 1928.
4. American Bar Association Journal, October, 1928.
5. American Bar Association Journal, April, 1929.
6. American Federalist, May, 1910.
7. American Law Review, March-April, 1908.
8. American Bar Association Journal, February, 1924.
9. The Green Bag, May, 1914.
10. Hearings, House Com. on Judiciary, Feb. 7, 1928.
11. Hearings, House Com. on Judiciary, Feb. 7, 1928.
12. "The Criminal and His Allies," Marcus A. Kavanagh.